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## THE DRY DECADE

Books by  
CHARLES MERZ

The Great American Band Wagon  
And Then Came Ford  
The Dry Decade

# THE DRY DECADE

BY

CHARLES MERZ



MCMXXXI

DOUBLEDAY, DORAN & COMPANY, INC.  
Garden City, New York

PRINTED AT THE Country Life Press, GARDEN CITY, N. Y., U. S. A.

BINDAP 3 '33

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FIRST EDITION

6927515

TO WALTER LIPPMANN



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## THE DRY DECADE



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## CHAPTER I

### Prohibition Before the War

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NATIONAL prohibition by constitutional amendment, the golden dream of thousands of devoted men and women, became effective at midnight on January 16, 1920. The night was quiet in New York. A few hotels draped their tables in black cloths in deference to the drooping spirits of Broadway, but no special ceremony marked the passing of the old order. In Washington a group of the chief prohibition leaders, including Mr. Bryan, Mr. Wheeler, Mr. Volstead, and Mr. Sheppard, gathered at the First Congregational Church to watch at the stroke of twelve for the supreme consummation of a cause to which they had given years of service. In Norfolk, Virginia, Mr. Billy Sunday preached the funeral service of John Barleycorn. The deceased arrived in a coffin twenty feet in length, brought to the doors of the tabernacle by a span of horses and trailed by a dejected Devil. "Good-bye, John," cried Mr. Sunday. "You were God's worst enemy. You were Hell's best friend. I hate you with a perfect hatred."<sup>1</sup>

This was the start of a new experiment in the United States. By what sequence of events it had come about, by whose command New York had lost control of one of its own customs, how authoritatively the leaders who

<sup>1</sup>New York *Times*, January 17, 1920.

gathered at this church in Washington represented the opinion of the nation, why Mr. Sunday was able on a night in January, 1920, to welcome a new order which had seemed impossibly remote ten years before, all this is still a subject of unending controversy.

## §

The long story of the early prohibition movement in the United States lies outside the purpose of this book, but a short summary of its adventures throws some light on the situation we have reached to-day.

It has often been pointed out that the prohibition movement in this country began not as a prohibition movement but as a temperance movement, directed at the task of winning converts by persuasion rather than by law. The origin of the movement can be traced as far back as Colonial days and followed well down into the nineteenth century in the steady growth of a reformist movement which had temperance as its goal. This movement never died. The old temperance societies like the Washingtonians and the Sons of Temperance have long since lost the large authority they once enjoyed; but temperance work is still carried on by the churches, by many social service agencies, and even by those militant prohibition societies which have sunk much of their moral fervor into the task of persuading Congress to enforce the law.

It would be a mistake, however, to assume that temperance rather than prohibition remained the chief goal of the reformist movement down to our own times and that only in comparatively recent years did there come a sudden violent wrench away from the old methods, a discarding of the old objectives, an abandonment

of the hope of temperance by moral suasion and a demand for abstinence by law.

So far back does this change in the major interest of the movement date that the first great wave of prohibition swept the country as long ago as the 1850's. Between 1846 and 1855 thirteen states adopted prohibition laws. Maine led the way, followed not only by New Hampshire, Vermont, Delaware, Michigan, Indiana, Iowa, Minnesota, and Nebraska, but by such unfamiliar converts to the cause of prohibition as Connecticut, Rhode Island, Massachusetts, and New York. This early wave of prohibition soon receded. Some of the laws were declared unconstitutional by the courts. Others were nullified by later legislation. Still others were repealed. By 1863 the thirteen prohibition states had shrunk to five. Four of these five seceded later.

A second wave of prohibition began in the 1880's. It had been twenty-five years since the crest of the first movement, and in this quarter century no new state had been added to the list. In 1869, however, the Prohibition party had been organized, and in 1874 the Woman's Christian Temperance Union took the field. To a new set of leaders the time seemed ripe for a crusade. Once more the movement started forward. In 1880 Kansas wrote prohibition into its Constitution, something that no state had ever done before. By 1890 North and South Dakota had adopted prohibition laws. Iowa and Rhode Island, having repealed their earlier legislation, were now experimenting with prohibition for a second time.

Once more the movement ebbed. Out of the legislative battles of the 1880's three states emerged with prohibition laws by 1905. These three were Kansas,

## The Dry Decade

Maine, and North Dakota. Meantime, however, a good deal of laboratory work had been carried on in other methods of regulating the traffic in intoxicating liquors. South Carolina had tried a dispensary system borrowed from northern Europe. Pennsylvania, Missouri, and Illinois experimented with high-license plans. Massachusetts tried a prohibition law, then a license system, then prohibition of everything except malt liquors, and then another license plan. Other states experimented with low-license, with exemption of wines and beer from prohibition laws, and with local option legislation under which counties, towns, and villages could outlaw the saloon.

How well or how badly these various systems worked, how well they were liked, why any of them failed, and whether this failure was due to factors inherent in the plan itself, to a poor start, or to maladministration: all this has been the subject of a vast controversy, characterized by a great uncertainty of fact. It is enough here to note that it was out of this decade of experiment that the third great wave of prohibition started. Georgia led the way in 1907. In rapid succession Oklahoma, Mississippi, North Carolina, Tennessee, and West Virginia fell into line.

All of these states, it will be noted, lay south of the Ohio and Potomac. All of them were primarily agricultural states, scarcely touched by the industrial revolution which had so thoroughly changed the interests and the point of view of many Northern states in the long half century since the first wave of prohibition swept the country.

Nevertheless, it was clear that after a long interlude the list of prohibition states had once more begun to gain. Six states had been added rapidly in six years'

time. There was reason to believe, in 1913, that a third wave of prohibition was plainly on the rise.

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If there was any single factor which had rescued the prohibition movement from its own inertia in the past and now given it a fresh start forward toward its goal, it seems fair to say that this factor was the attitude displayed toward all this agitation by the brewers and distillers.

These gentlemen had a large stake in the controversy over liquor which had been in progress now for more than fifty years. They had a stake, by 1913, which may conservatively be estimated as worth a billion dollars. They wished to preserve this stake, and they chose a method of preserving it which has frequently been tried by organizations under fire and very often failed: they stood pat in the face of an opposition whose strength they underestimated and scorned all talk of compromise.

There was never a moment in the history of these years when the brewers could not have reformed the institution which was the chief point of attack in the campaign against their vested interests made by the prohibition movement. This institution was the saloon. The power of the brewers over the saloon was absolute. They controlled it under mortgage bonds and under their power to shut off its supply. They could have changed the saloon, or even have destroyed it, if they had wished to act.

Later on, when it was too late to profit them, the brewers showed themselves aware of the power which they held and regretful that they had made no more

effective use of it. This was in 1916, when members of the United States Brewers' Association announced through advertisements in the press that they lamented the "false mental association" which had coupled the brewers with the worst of the saloons, confessed that for this association they themselves were in large part responsible, and offered to show the country, if it would give them time, that they were ready to reform the saloon and to promote temperance—"real temperance, which means sobriety and moderation; not prohibition, which has proved a fallacy and a failure."<sup>2</sup>

It is idle to speculate on what might have happened had this announcement been made in 1906 instead of 1916 and had it been followed by action taken in good faith. Reformation by the brewers and distillers of their own trade might have averted national prohibition. It is an academic point. There is no way of telling now. The question was not tested. Apparently convinced that the gods were on the side of a billion dollars, wherever it was found, and that the prohibition movement would once more peter out, the brewers and distillers refused all reformation and all compromise. They might have attempted to protect their business by putting it in order. They preferred to argue that there was nothing in their business which needed to be put in order and to spend their time and effort creating an elaborate system of protection which toppled to the ground.

The history of this effort was partially revealed by an investigation made by a committee of the Senate in the fall of 1918. The story which this investigation tells is a story of money wasted, energy misspent, and a system of alliances so obviously artificial that it creaked

<sup>2</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 1032-1033.*

at every joint when it was subjected to high pressure.

By their own admission the brewers dumped money into various states to win elections for friends who promptly failed them; they financed a dummy chamber of commerce which existed largely for the purpose of fighting liquor legislation; they employed experts to investigate the strategy of the prohibition movement, at a time when the prohibition movement was shouting its strategy from the housetops; they organized a black-list system which threatened to withhold trade from a long list of businesses regarded as unfriendly to the brewers' interests.<sup>3</sup>

The Delaware, Lackawanna & Western Railroad was on this list because it had forbidden its employees to drink liquor. The Grasselli Chemical Company of Cleveland was on the list because some of its officials had given their support to a revival meeting staged by Billy Sunday. The Heinz Pickle Company was on the list because its president was an officer of a Sunday-school association which had championed the cause of prohibition.<sup>4</sup>

This petty and capricious system of attempting to control opinion by means of a business boycott is typical of the tactics employed by an industry which misjudged its power. The brewers and distillers were confronted by a larger problem than they knew how to handle. Their inability to cope with it explains one reason why the prohibition movement was able to recover time and again from its successive setbacks and resume its brisk advance.

<sup>3</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 65th Congress, pursuant to S. Res. 307.*

<sup>4</sup>*Ibid.*; see also *New York Times*, November 21, 1918.

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It would be a mistake to suggest that while the brewers temporized with a situation which grew more and more alarming from their point of view, the prohibition movement bowled along of its own momentum, gathering impetus for its third great drive from the support which flowed to it spontaneously from distant sections of the country.

The prohibition movement was not spontaneous and never had been. It had in 1913, as it had always had, a basic fund of sentiment to draw upon, in the moral teaching of the schools, in the temperance work of the churches, in popular disapproval of the drunkard, and in the increasingly persuasive proof that intemperance was a heavy handicap to modern industry. But the task of converting this sentiment into a sustained demand for prohibition, rather than an appeal for temperance, was a task which required the expenditure of a vast amount of money and the unrelenting efforts of many salaried men. Mr. Wayne B. Wheeler testified before a committee of the Senate in 1926 that in thirty years of active labor no less than \$35,000,000 had been spent by the friends of prohibition to create and to sustain public interest in their cause.<sup>5</sup>

Fortunately for the friends of prohibition, there was an organization in the field by 1913 which was capable both of raising large sums of money and of spending them to good advantage. This organization was the Anti-Saloon League of America, founded at Oberlin, Ohio, in 1893, approximately at the time when the

<sup>5</sup>Testimony before the Senate Campaign Fund Investigating Committee, June 23, 1926.

second of the three great waves of prohibition was beginning to recede.

The founders of this movement were a few men whose interest in prohibition had brought them together, shortly before this time, in an effort to obtain the adoption of a local option law. In this venture they had had the support of the local churches, and with the churches the Anti-Saloon League was closely identified from the day of its foundation.

The original meeting to organize the League was held in the First Congregational Church at Oberlin on June 4, 1893. The first affiliation which substantially increased the membership of the new society was a merger with a church temperance alliance effected in this same year. The call for a convention in 1895 to establish the society on a national scale was issued after a conference of influential churchmen. When this convention assembled in Washington it was at the Calvary Baptist Church, with delegates present representing not only the more important temperance organizations but various church bodies.

It was under church auspices that the League was born and to the churches that it turned for patronage. As Mr. Ernest H. Cherrington, secretary of the national executive committee of the League, has pointed out: "The movement was dependent upon the church, first of all, for financial support. It was also dependent upon the church for the necessary influence and power to turn the tide along non-partisan lines in the election of members of the legislatures favorable to temperance legislation and in the election, as well, of public officials who would enforce the law."<sup>6</sup>

<sup>6</sup>Ernest H. Cherrington, *History of the Anti-Saloon League*, p. 61.

The churches were not won easily. A venerable tradition against church intervention in politics raised certain stubborn doubts. As Mr. Cherrington says, "many years of difficult and persistent endeavor were necessary to line up the church on the right side of this new movement."<sup>7</sup> By 1913, however, the League had won its fight. A long list of churches had rallied to its support. Whatever doubts they may have had concerning church activity in politics had long since capitulated to their burning enthusiasm for the achievement of an immediate reform.

Armed with the powerful support of the churches, the Anti-Saloon League had expanded rapidly. Its declared interest lay in political action to destroy the liquor traffic, primarily, as its name indicated, through the abolition of the saloon. Its method of achieving this result consisted of an omni-partisan plan of endorsing candidates which permitted the dry voter to vote dry without bolting his own party. The driving force behind this plan was a tireless campaign of propaganda. The extent of this propaganda, and the size of the task which it reflected, may be judged from figures covering a period beginning shortly before this time and running a few years later. Between October, 1909, and January, 1923, the Anti-Saloon League press at Westerville, Ohio, turned out 114,675,431 leaflets, 1,925,463 books, 2,322,053 placards, 5,271,715 pamphlets, 21,553,032 miscellaneous items, and 157,314,642 copies of weekly and monthly magazines.<sup>8</sup>

Year after year the presses spun with the vast literature of the prohibition movement, carrying into remote

<sup>7</sup>Ernest H. Cherrington, *History of the Anti-Saloon League*, p. 62.

<sup>8</sup>Peter Odegard, *Pressure Politics*, p. 75.

corners of the country fresh appeals to friends and challenges to foes, arguing fresh reasons for the adoption of new laws, seizing upon every incident which might be turned to the profit of the cause, and meeting the propaganda of the brewers with a counter-propaganda no less partisan but far more ably handled.

The task was almost endless. For once an election was over, a large part of the public promptly lost its interest and the campaign had to start afresh. Mr. Wheeler himself once testified that even in 1917, following the most critical election in the history of the League, and at a time when the crusading spirit of this movement had theoretically reached its height, the problem which faced the Anti-Saloon League was how "to maintain public interest in prohibition until the new Congress should convene."<sup>9</sup>

§

In 1913 the Anti-Saloon League had been at work for twenty years. It was battle-scarred with valuable experience. It had lifted the list of prohibition states from three to nine. It had added to these states so many no-license counties that officials of the League were already claiming "two thirds of the territory of the country is now dry."<sup>10</sup> What had happened, meantime, to the liquor traffic?

It is one of the least noticed but most interesting facts in the story of the prohibition movement that the consumption of intoxicating liquor increased steadily despite the enactment of new prohibition laws. It is not

<sup>9</sup>New York *Times*, March 30, 1926.

<sup>10</sup>Associated Press dispatch, Columbus, Ohio, November 11, 1913.

necessary to regard the laws as the cause of increased drinking, but it is certain that they failed to stop it.

In one respect, it is true, there had been a marked decrease in the consumption of alcoholic liquors. In 1850 the per capita consumption of distilled spirits in this country had been 2.24 gallons; by 1910 it had dropped to 1.43 gallons.<sup>11</sup> This was a decrease of only a little less than 40 per cent: convincing evidence that years of temperance work had succeeded in checking and reducing the use of hard liquor in the United States.

In all other respects, however, the figures show a steady increase. In this same period of sixty years the per capita consumption of wine more than doubled and the per capita consumption of beer increased by more than a thousand per cent.<sup>12</sup> The aggregate figures for all forms of intoxicating liquor show this rising curve:

In 1850, before the first great wave of prohibition, the per capita consumption of liquor in the United States was 4.08 gallons a year.<sup>13</sup> By 1860, at the end of the first wave of prohibition, it had increased to 6.43 gallons. By 1880, when the second prohibition wave was getting under way, it was 8.79. In the decade of the 'eighties, when the second wave was at its height, it increased to 13.20. In the decade of the 'nineties it rose to 16.98. In the decade from 1900 to 1910, with five new states adopting prohibition and the local option movement in full swing, it increased to 20.53. Finally, in the year 1913, precisely at the time when the Anti-Saloon League was asserting that "two thirds of the territory of the country is now dry," it rose stubbornly to 22.80. At this point it had multiplied by more than five the

<sup>11</sup>*Statistical Abstract of the United States*, 1920, p. 561.

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

figure for the year 1850, before all this agitation started.

There were two ways in which these steadily rising figures might be interpreted. Either they meant that by 1913 one third of the territory of the country was consuming five times the amount of liquor consumed by the whole country sixty years before; or else they suggested that liquor from wet states was still flowing into dry states and dry counties from across their borders, with their approval or against their will.

Since the second of these assumptions was the only credible one, the friends of prohibition turned it into a ready argument for action by the federal government. The failure of local laws to reduce the consumption of liquor did not destroy their faith in legislation; it enlarged it. As Senator Borah once summarized from his personal observation the convictions of the prohibition leaders:

“Having lived in a dry state, and believing, as I do, that the people have a right to prohibition if they want it, and having seen our laws broken down and trampled under foot by powers outside of the state, I became convinced that so long as one state could ship into or through another state it would be utterly impossible for the state to protect itself unless the national government, which had that power, also declared that policy.”<sup>14</sup>

Viewed in this light, the agitation for national action was not an effort to extend the demonstrated advantages of state-wide prohibition to the country as a whole. It was an effort to win for the dry states those advantages, not yet demonstrated, which the friends of prohibition

<sup>14</sup>Debate at Boston with Dr. Nicholas Murray Butler, *New York Times*, April 8, 1927.

thought that prohibition could be made to bring, once state laws were no longer "trampled under foot" by interests outside of their own borders.

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The action designed to protect the dry states in the exercise of sovereignty over their own affairs was the adoption of the Webb-Kenyon Law. Contrary to much that is said of the law to-day, this measure was not intended to prevent entirely the shipment of liquor from wet states into states with prohibition laws. It did not go that far. It merely prohibited such shipments as were "in violation of" state legislation. Some of the dry states legalized importation under certain restrictions. It was not the purpose of the new law to attempt to alter these restrictions.

The Webb-Kenyon Law was adopted by Congress in February, 1913, by large majorities in both Houses, many wet members agreeing that it was only fair to give the dry states the protection for which they asked. To the surprise of Congress, however, the bill was vetoed by President Taft, on the ground that it was unconstitutional and "clearly violated the commerce clause of our fundamental law."<sup>15</sup> The President had been advised to this effect by his Attorney General, Mr. George W. Wickersham.<sup>16</sup> Congress disagreed with him. Both Houses promptly passed the bill over the President's veto.

It is clear that at this point an interesting experiment began: an experiment in discovering whether the au-

<sup>15</sup>*Congressional Record*, 62d Congress, 3d Session, pp. 4291-4292.

<sup>16</sup>*Ibid.*, pp. 4292-4296.

thority of federal law, properly backed by federal enforcement, could actually have protected the dry states against invasion, in so far as each state, following its own standards, wished to be protected against invasion.

The friends of constitutional prohibition insist to-day that this experiment failed; that the wet states continued to tyrannize the dry states; and that constitutional prohibition on a national scale was the logical and inevitable answer.

If this is true, then the decision was reached in a remarkably short time. The Webb-Kenyon Law was enacted in February, 1913. In November of this same year, before the Webb-Kenyon Law was nine months old and before any funds had been appropriated by the federal government for the purpose of enforcing it, the Anti-Saloon League suddenly switched from the state law plan which had been its goal for twenty years and for the first time in its history demanded a constitutional amendment.

§

The meeting at which this decision was reached was the "Jubilee Convention" of the League, held at Columbus, Ohio, in the second week of November, 1913. It was a memorable meeting, opening in the hush of an expected call to arms and reaching its decision in an outburst of enthusiasm.

Plans were laid at once for a demonstration at the Capitol. Four weeks later, on December 10th, a procession of four thousand men and women marched down Pennsylvania Avenue, while the street crowds smiled, white streamers fluttered from the lapels of winter over-coats, and the band played "Onward Christian Soldiers." On this same December 10th Senator Sheppard

introduced his resolution for a constitutional amendment.

With the fresh impetus lent by the setting of a new and bolder goal, the prohibition movement now leapt forward. Mr. Wheeler has described the burst of energy which followed the 1913 demonstration. Fifty thousand speakers were sent into the Congressional elections of 1914. Tons of new literature were turned out at Westerville. "It was no uncommon thing for carloads of printed material to roll out in one day for the front. . . . Under the terrific pace our finances expanded. . . . Our expenses gradually increased until they reached the greatest figure in our history, about \$2,500,000 a year. . . . We went into every Congressional district where there was a chance to elect a dry and waged as strong a fight as candidates have ever seen."<sup>17</sup>

The results of this activity were promptly apparent both at the Capitol and in the states.

At the Capitol, a resolution for a constitutional amendment similar to Senator Sheppard's resolution was brought before the House of Representatives one month after the conclusion of the campaign which Mr. Wheeler has described. It received a vote of 197 in favor to 190 opposed: less than the two thirds vote required, but a clear majority.<sup>18</sup>

In the states the movement for more legislation swept ahead with the same sudden burst of energy which had marked the progress of the first great prohibition wave in the middle of the previous century, when four states adopted laws in 1852, one in 1853, one in 1854, and six in 1855. Now, in this third great wave, five states adopted laws in 1914, five in 1915, and four in 1916—

<sup>17</sup>*New York Times*, March 29, 1926.

<sup>18</sup>*Congressional Record*, 63d Congress, 3d Session, p. 616.

bringing the list of prohibition states to twenty-three.

In this same year, the year before the war, the friends of prohibition began another drive for the election of a Congress committed to national action. This was the election of 1916; and if the Anti-Saloon League and its allied organizations had thrown themselves with fervor into the Congressional election two years before, they now outmatched their own best efforts. "All the energy we put into the 1914 campaign boiled and bubbled with hotter fire," wrote Mr. Wheeler, a decade later.<sup>19</sup> "We laid down such a barrage as candidates for Congress had never seen before and such as they will, in all likelihood, not see again for years to come."

This was the election which sent to Washington the Congress destined so shortly and to a large part of the country so unexpectedly to adopt the Eighteenth Amendment and send it to the states. There were thousands of untroubled people living in Eastern cities who refused to believe that prohibition was an issue.

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If we stop at this point to recapitulate, we can measure the situation as it shaped itself on the first of April, 1917, and throw some light on the validity of certain current dogmas.

1. There is the dogma, popular with many wets, that national prohibition was foisted on the country without the slightest semblance of a warning. It is worth remembering here that a majority of the House of Representatives had voted in favor of a constitutional amendment as early as December, 1914. To the most

<sup>19</sup>*New York Times*, March 30, 1926.

cocksure wet this should have been ample notice of the possibility that lay ahead. The opponents of prohibition needed to hold only one third of the House in order to block the adoption of a constitutional amendment. As events turned out, they had three years in which to attempt to elect and to organize a bloc of 146 votes. They neglected this opportunity and continued to regard prohibition as an empty threat.

2. There is a second dogma of the wets that in those states which adopted prohibition before the war the decision was reached by the arbitrary action of the state legislatures and not by the free choice of the electorate itself. The truth is more nearly the reverse of this. In only nine states was prohibition adopted solely by action of the legislature.<sup>20</sup> In all of the others there was a direct consultation of the electorate and a direct choice at the polls, either through the initiative and referendum or when the legislature submitted the question to a popular decision.

3. There is a third dogma of the wets, inconsistent with the previous dogma, that "the woman vote" was in large part responsible for prohibition. There is little basis for this theory. On the final question of ratifying the Eighteenth Amendment no women voted (and no men) except in one state, Ohio. On the question of state laws, women voted in only seven states which adopted prohibition before the war. These seven were Arizona, Colorado, Utah, Idaho, Montana, Oregon, and Washington. In all other states prohibition came first and woman suffrage afterward.

4. Meantime, there are various dogmas of the drys. There is the dogma that even before the war prohibition had won national support and not merely sectional sup-

<sup>20</sup>Cf. Appendix A.

port. Twenty-three states had adopted prohibition laws by the end of 1916. Three more were added in the first few months of 1917, bringing the list to twenty-six. Where were these states placed? Fourteen were west of the Mississippi. Eight were south of the Ohio and Potomac. Two (Maine and New Hampshire) were in the northern and rural half of New England. In the belt of thirteen thickly populated industrial states reaching from Massachusetts on the east to Missouri on the west, prohibition had won only Michigan and Indiana. In Indiana the law had been adopted by the legislature without a popular vote. In Michigan there had been a referendum. The one large city in the state, Detroit, had voted wet.<sup>21</sup> The rural sections had snowed it under. In 1917 prohibition was still a method favored principally in the agricultural states of the West and South. Its gains in the East and North were relatively unimportant.

5. There is the dogma of the drys that in those states which had adopted prohibition by popular vote an overwhelming majority of the electorate had shown itself in favor of this action. A list of the state votes will be found in Appendix A. It shows that 1,967,337 people voted for prohibition in these states, as against 1,437,402 opposed. These figures are fairly close. For every nineteen people who wanted prohibition, fourteen opposed it. The total vote is very small: so small that all of the state prohibition laws which were enacted in this country prior to the war were enacted by the affirmative votes of less than 4 per cent of the adult population of the country.

6. Finally, and from the point of view of the present situation most significant, there is the dogma of the

<sup>21</sup>*Michigan Manual*, 1917, p. 483.

drys that the ultimate adoption of the Eighteenth Amendment was definitely foreshadowed by the adoption of prohibition in twenty-six states before the war, and that the Eighteenth Amendment was merely a crowning achievement which followed logically and inevitably from this earlier legislation.

The weakness of this dogma lies in its assumption that all twenty-six states had adopted a system of prohibition comparable with the system to be established later by the Eighteenth Amendment: in other words, that they had chosen to be bone dry. This is a misleading theory.

It is true that in February, 1917, two months before the United States entered the war, Congress adopted the Reed bone-dry amendment: a drastic measure unexpectedly proposed by a bitter enemy of prohibition rather than a friend, reinforcing the Webb-Kenyon Law with a new law forbidding interstate shipment of intoxicating beverages into any state which prohibited manufacture and sale, whether or not it also prohibited importation. This was a fiat from Washington, however, and not a decision by the states themselves. A large number of the dry states had never chosen to be bone-dry. They had chosen, on the contrary, to prescribe a thoroughly legal means of obtaining and using intoxicating liquor. On this point the authoritative compilation of state laws assembled by Mr. Wheeler and published under the auspices of the Anti-Saloon League<sup>22</sup> leaves no room for doubt.

Alabama is one of the states always listed as dry before the war. But the Alabama law provided (Section 3a) that any citizen might legally import two quarts of

<sup>22</sup>Wayne B. Wheeler, *Federal and State Laws Relating to Intoxicating Liquor*, second edition, May, 1918.

distilled spirits or two gallons of wine or five gallons of beer every fifteen days if he so desired.<sup>23</sup>

Virginia was another of the dry states. But the Virginia law provided (Section 39) that once in every thirty days "one quart of distilled spirits or three gallons of beer or one gallon of wine may be brought to any person not a student at a university, college or any other school, nor a minor, nor a female (not the head of a family) for his own use."<sup>24</sup>

Indiana was a dry state; but its prohibition law denied (in Section 5) any intention to interfere with the domestic manufacture of wine, "nor shall this act be construed to prohibit a person from giving intoxicating liquor to a guest in his own home."<sup>25</sup>

Michigan was a dry state. It had written prohibition into its Constitution. Under Article XV "the manufacture, sale, keeping for sale, giving away, bartering or furnishing" of any form of intoxicating liquor was "prohibited forever."<sup>26</sup> This article, however, said nothing to prohibit personal importation of liquor for personal use. This privilege remained intact.

Maine, New Hampshire, Iowa, and North Dakota were dry states; but their laws, like Michigan's, said nothing to prohibit personal importation of liquor for personal use.<sup>27</sup>

Mississippi, North Carolina, West Virginia, Tennessee, and South Carolina were all dry states. But the Mississippi law (Section 12) permitted the manufac-

<sup>23</sup>Wayne B. Wheeler, *Federal and State Laws Relating to Intoxicating Liquor*, second edition, May, 1918, p. 93.

<sup>24</sup>*Ibid.*, p. 766.

<sup>25</sup>*Ibid.*, p. 194.

<sup>26</sup>*Ibid.*, p. 49.

<sup>27</sup>*Ibid.*, pp. 274, 416-430, 206, 507-509.

ture of home-made wine.<sup>28</sup> The North Carolina law (Section 3) legalized the importation of one quart of spirits or five gallons of beer every fifteen days.<sup>29</sup> The West Virginia law (Section 4) permitted the manufacture of wine for personal use and (Section 31) the importation of one quart of liquor every thirty days.<sup>30</sup> The Tennessee law permitted manufacture for personal use.<sup>31</sup> The South Carolina law, authorizing importation of one quart of liquor every thirty days on the assertion of the importer that "the same is desired for medicinal purposes," legalized the possession of such liquor on condition (Section 15) that it was not stored up in "any unusual amount or in any unusual way."<sup>32</sup>

Mr. Wheeler's compilation makes it clear, in fact, that while there were many townships and counties throughout the country which had adopted some form of prohibition under local option, and while there were many states which had adopted some form of prohibition on a state-wide basis, there were only thirteen states before the war which had sought to anticipate on a state-wide basis the drastic bone-dry legislation of the Eighteenth Amendment.

These states were Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Montana, Nebraska, Oklahoma, Oregon, South Dakota, Utah, and Washington, all in the South and West.

The total area of these states was 1,119,555 square miles, or 36.9 per cent of the area of the country.

<sup>28</sup>Wayne B. Wheeler, *Federal and State Laws Relating to Intoxicating Liquor*, second edition, May, 1918, p. 371.

<sup>29</sup>*Ibid.*, p. 473.

<sup>30</sup>*Ibid.*, pp. 806, 817.

<sup>31</sup>*Ibid.*, pp. 632-634.

<sup>32</sup>*Ibid.*, pp. 570-571.

Their total population in 1910 was 13,200,907, or 14.3 per cent of the population of the country.

These thirteen states covered more than a third of the territory of the United States but held only one seventh of its people.

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On the eve of the war, then, the situation may be summarized as follows:

A large number of states had adopted prohibition laws, but only thirteen states had adopted bone-dry laws. Local option was still the established principle in most of the populous industrial states. In many other states, theoretically dry, the adoption of prohibition had not been intended absolutely to prohibit the purchase or the use of intoxicating liquors but rather to abolish the saloon and to place the traffic under rigid supervision. Some of these states permitted importation in limited amounts, until the Reed Amendment forbade such importation in February, 1917. Some permitted importation in limited percentages. Some permitted home manufacture in certain forms. Some drew a distinction between men and women as purchasers of liquor. In each case the methods and the penalties of prohibition varied according to local customs, local standards and local taste.

Meantime, ignoring these actual and potential variations in local theory, there was the proposal militantly advanced by the Anti-Saloon League for a single rigid standard: a standard requiring absolute and compulsory prohibition for the entire nation.

These two plans were fundamentally dissimilar in philosophy and in method. One plan rested on local initiative; the other on centralized authority. One plan

was loosely shaped to take account of local prejudice; the other compromised with nothing. Yet both plans, in 1917, were plainly gaining ground.

In the states the drift of affairs was unmistakably in the direction of more laws rather than less laws and of an increasingly rigid control, even in local option states, of the whole business of manufacturing and distributing alcoholic liquor. In Washington a majority of the House of Representatives had voted in favor of a constitutional amendment in December, 1914, and the Anti-Saloon League was now ready to predict that on the next test of strength the plan for constitutional prohibition would do better.

Certainly there was much to justify the faith of the militant prohibitionists in 1917, despite the reluctance of the states themselves to adopt bone-dry prohibition. The Anti-Saloon League could count on its own effective political and religious power; on a steadily increasing resentment in most parts of the country against the saloon; on the reluctance of the brewers and distillers to put their trade in order; and perhaps above all else on the absence of any movement or any organization interested in planning a moderate program of reform.

Whether the combination of these forces would have been powerful enough to override the old method of state action and to obtain the adoption of the Eighteenth Amendment, provided no sensational new factor had suddenly been introduced, is a question destined never to be answered.

At this point came the war,

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## CHAPTER II

### The Adoption of the Eighteenth Amendment

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THE WAR did three things for prohibition. It centralized authority in Washington; it stressed the importance of saving food; and it outlawed all things German.

The first of these three changes was inevitable. The war brushed aside the restraints normally imposed on Congress. In rapid succession laws were adopted authorizing the government to do things which it had never done when the nation was at peace: seize railways, requisition factories, take over mines, fix prices, put an embargo on all exports, commandeer all ships, standardize all loaves of bread, punish all careless use of fuel, draft men for an army, and send that army to a war in France. With such drastic legislation as a pattern, the proposal for one more drastic law seemed commonplace. For any suddenness, any boldness, and any severity involved in the adoption of a national prohibition law, a dozen persuasive precedents had been set before the war was three months old.

In the second place it was clear from the start that food was an important factor in the war and that great quantities of food could be saved if an end were put to brewing and distilling. This point was promptly emphasized by the friends of prohibition. It was echoed by many men in public life who were not identified with the

prohibition movement and never had been, but who recognized that prohibition could be made an effective means of saving grain.

These men included party leaders, business men, publicists, and educators. The President of Brown University declared that it was impossible to talk of patriotism "while we continue to pour hundreds of millions of bushels of grain annually into the breweries."<sup>1</sup> Colonel Theodore Roosevelt announced himself a prohibitionist for the duration of the war and sent a letter to the National Temperance Board championing the cause.<sup>2</sup> Mr. Herbert Hoover, at this time a volunteer returned from Belgium, not yet appointed Food Administrator, advocated prohibition as an emergency measure for the war, admitted that it might be difficult to apply it "with fairness to all sides," and suggested the appointment of a commission of investigation.<sup>3</sup>

Inevitably the effect of a long series of such statements was to give momentum to the prohibition movement, even when these statements advocated prohibition strictly for the duration of the war. So grateful were the drys in Congress for this sudden rush of fresh support, and so eager to start forward with their legislation, that before the war was six weeks old they attempted to write prohibition into a war bill that dealt with German spies.<sup>4</sup> This effort failed. But when the time came a little later to enact the Food Control Law, the drys in Congress seized upon the unanswerable statistics of the use of grain for alcoholic liquors and

<sup>1</sup>New York *Times*, June 18, 1917.

<sup>2</sup>Associated Press dispatch, Washington, December 24, 1917.

<sup>3</sup>New York *Times*, May 10 and 27, 1917.

<sup>4</sup>Congressional Record, 65th Congress, 1st Session, pp. 2167, 2196, 2269.

wrote into this law a provision (Section 15) forbidding the manufacture of distilled spirits from any form of foodstuffs. By a fortunate coincidence this action was taken two days before the Senate was called upon to debate the merits of the Eighteenth Amendment.

Finally, as the third of the three chief contributions made by the war to the cause of prohibition, there was the obvious opportunity it afforded the drys in Congress and outside of Congress to point out the close association between the brewers' trade and many men with German sympathies. Time and again, throughout the whole controversy over the adoption of the Eighteenth Amendment, the brewers were denounced not only as enemies of temperance but as enemies of peace. "The liquor traffic aids those forces in our country," insisted Mr. Wheeler, "whose loyalty is called into question at this hour. The liquor traffic is the strong financial supporter of the German-American Alliance. The purpose of this Alliance is to secure German solidarity for the promotion of German ideals and German Kultur and oppose any restriction or prohibition of the liquor traffic. Its leaders urge its members to vote only for those who stand for Germanism and oppose prohibition."<sup>5</sup>

It was a happy combination, for men who shared Mr. Wheeler's interest in the enactment of new legislation.

As the Anti-Saloon League in New York suggested: "The spirit of service and self-sacrifice exemplified in a wonderfully efficient and loyal staff made it possible to take advantage of the war situation and the confusion which He whom we serve has wrought among our enemies."<sup>6</sup>

<sup>5</sup>New York Times, November 9, 1917.

<sup>6</sup>American Issue, New York Edition, June 14, 1919.

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With its new prestige as a war measure added to the earlier gains which it had made while the nation was at peace, prohibition came into Congress three months after the declaration of war, in the form of Senator Sheppard's resolution to add an amendment to the Constitution of the United States.

This resolution was not the Eighteenth Amendment as we know it now, but a shorter and simpler amendment favorably reported to the Senate on June 11th by the Committee on the Judiciary. The Amendment in this shorter form consisted of two sections, one prohibiting the "manufacture, sale or transportation" of intoxicating liquors for beverage purposes; the other granting Congress "power to enforce this article by appropriate legislation."<sup>7</sup> This second article reserved to the states their right "to enact and enforce laws prohibiting the traffic in intoxicating liquors," but said nothing on a point which has subsequently become the subject of bitter controversy: namely, the question of "concurrent" power for the states to enforce the federal Amendment. The word "concurrent" was not mentioned.

In this simpler form the Amendment was brought before the Senate on July 30th, debated for three hours on that day, four hours on the next, and six hours the day following, most of the debate on the third day being limited to ten-minute speeches under a rule to which the Senate had agreed.

Considering the dimensions of this question, the enormous number of people whose personal conduct

<sup>7</sup>*Congressional Record*, 65th Congress, 1st Session, p. 5548.

was involved, and the apparently irrevocable character of the decision, it might be thought that thirteen hours of debate, much of it under a ten-minute rule, failed to provide an adequate time in which to dispose of one of the most far-reaching resolutions in the history of the American Republic. It is doubtful, however, whether the result would have been appreciably different if the Senate had talked for a longer time. A victory for the resolution was plainly foreshadowed from the start.

On both sides the argument consisted chiefly of a repetition of the familiar disagreements which had sustained this controversy for three decades, but with one striking difference in the present case. The war had brought a new and powerful argument to the cause of prohibition. The friends of prohibition made the most of it.

Figures were cited to prove that prohibition would release large numbers of men for the army, for ship-building and munitions work. Why should the country permit workmen to be employed in the useless manufacture of intoxicating liquor, asked Mr. Kenyon of Iowa, "when there is a shortage of labor in the important and necessary work to carry on the war?"<sup>8</sup>

More figures were cited to prove that by shutting off grain from the breweries and distilleries the country would save the equivalent of 11,000,000 loaves of bread a day—"enough to supply the bread needs of the English, French, and Italian armies," Congress was told, "counting the bread ration at a little less than one pound a day per soldier"—and "much more than enough to supply the entire bread relief of Belgium."<sup>9</sup>

<sup>8</sup>*Congressional Record*, 65th Congress, 1st Session, p. 5639.

<sup>9</sup>*Ibid.*, p. 5655.

Why should Congress hesitate to act, asked Mr. Thompson of Kansas, when by adopting the Amendment it could "contribute more to the final success and victory in the present war" than by any other action it could take?<sup>10</sup>

Whether such arguments as these changed any votes on the floor of the Senate, or whether the die was cast before the debate began, it is impossible to say. In either case, in a short and somewhat unreal debate the Senate spent a large part of its time discussing details. Most of the real dispute, and most of the Senate's thirteen hours, was devoted to the question of the precise form in which the proposed Amendment should be worded. Five attempts were made to alter the language of the Amendment. The first four failed. The fifth succeeded.

The first attempt was made by Senator Hardwick of Georgia, who insisted that if the friends of prohibition were sincere in their stated wish to make the country dry they ought to be bold enough to forbid not only the "manufacture," "sale," and "transportation" of intoxicating liquor, but also its "use" and "purchase." Mr. Hardwick therefore moved to add these two words to the resolution. He would have made the Eighteenth Amendment less equivocal and far more drastic, but too drastic for a cautious Senate. No such vigorous language as this was really needed, said the author of the resolution, Mr. Sheppard. In fact, it would prove to be a waste of words. For once manufacture was stopped and sale was stopped, there would be no liquor on the market and hence no risk of use or purchase.<sup>11</sup>

<sup>10</sup>*Congressional Record*, 65th Congress, 1st Session, p. 5619.

<sup>11</sup>*Ibid.*, p. 5647.

By a vote of 62 to 4 Mr. Hardwick's amendment was defeated. The small company of four consisted of Mr. Hardwick himself, Mr. Reed of Missouri, Mr. Broussard of Louisiana, and Mr. Harding of Ohio.

The next three efforts to change the resolution were equally unsuccessful. Two proposals were made to exempt beer and wine from the Amendment and limit it to hard liquor; one proposal to recompense the brewers and distillers for damages they would suffer. Apparently none of these proposals was offered in the hope that it would be accepted. None was seriously debated by the Senate. All were easily defeated.

There remained one other plan to change the resolution. This was the proposal made by Mr. Harding of Ohio to put a time-limit of six years on the process of ratification by the states.

A few of the friends of prohibition, including Mr. Borah, suspected the motive behind this plan and vigorously denounced it.<sup>12</sup> Other friends, however, were willing to accept the proposal, not because they wanted it, but because it seemed to them a necessary compromise. Mr. Jones of Washington frankly admitted that without a time-limit there was grave danger of the whole Amendment being voted down. "A very careful investigation has convinced some of us that a two thirds vote is very uncertain unless this limitation is put on."<sup>13</sup> This argument proved to be decisive. With most of the drys rallying to its support, Mr. Harding's proposal was accepted.

Ten minutes later came the final test. By the top-

<sup>12</sup>*Congressional Record*, 65th Congress, 1st Session, pp. 5649–5650.

<sup>13</sup>*Ibid.*, p. 5658.

heavy vote of 65 to 20 the Senate adopted the Amendment and the battle shifted to the House.<sup>14</sup>

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There occurred at this point an interlude of four and a half months, during part of which time Congress stood adjourned. It was on August 1st that the Senate gave its approval to Mr. Sheppard's resolution and not until December 17th that the resolution came before the House. Meantime the House Committee on the Judiciary had made certain interesting changes in its text. The six years proposed as a time-limit on ratification in the Senate draft was changed to seven; a new provision was added, giving the brewers a year of grace before the Amendment took effect; the word "concurrent" made its appearance for the first time in a totally new section which declared: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

The first two of these three changes can be explained by what Mr. Wheeler later called "a trade in jack-knives."<sup>15</sup> The wets had asked for the year of grace; the drys consented on condition that the six year limit for ratification be raised to seven. On this basis the two sides struck a bargain.

The third change raised a more important question, though the House showed little interest in it at the time. Casually, and without seeming to recognize that it was sowing the seeds of a bitter controversy, the Judiciary Committee introduced that section of the

<sup>14</sup>The vote of the Senate on the Amendment will be found in Appendix B.

<sup>15</sup>New York *Times*, March 31, 1926.

Eighteenth Amendment which gives the states "concurrent" power to enforce: a section destined to become the subject of an endless quarrel between those who believe that the Eighteenth Amendment places an obligation on the states and those who deny this theory. The House seems to have had no premonition of the dispute which lay ahead. As casually as its committee had proposed the plan, the House adopted it—without bothering to debate the question even for five minutes.

For this alacrity it is not difficult to find an explanation. Here was a proposal which seemed somehow to involve the states in the problem of enforcing the Amendment. Any proposal directed toward this end, promising to relieve Congress of a heavy burden, was obviously welcome to the House. As the chairman of the committee said: "We do not want ten thousand federal officers, with all the expense of salaries, going over the country enforcing these laws when the states have their own officers to do so and are willing to do so."<sup>16</sup> The House wholeheartedly agreed. But whether all forty-eight states would actually prove to be "willing to do so" and what would happen if they were not willing, the chairman of the committee did not explain. The House asked him no questions.

As in the Senate's case, debate on the whole question of the Amendment occupied less time than the House frequently devotes to a revenue measure or a public buildings bill. The Senate had given the resolution part of three days' time. The House encompassed it at a single session beginning at eleven in the morning and lasting until six at night.

Much of the debate, as in the Senate's case, re-

<sup>16</sup>*Congressional Record*, 65th Congress, 2d Session, p. 424.

hearsed familiar arguments. Much of it stressed the importance of national prohibition as a contribution to the winning of the war—striking “the mightiest blow possible at the Prussian idea,” as Mr. Kelly of Pennsylvania put it<sup>17</sup>—though it seemed clear that the Amendment could not take effect until the states had ratified it and the brewers had received their year of grace, a process which was not likely to be completed until the war was over and the nation was again at peace.

Nevertheless, it was inevitable that the war should be discussed and that it should arm with a fresh argument those members of the House who were convinced that prohibition was sound policy. The opponents of the Amendment derived no similar comfort from the war. They had only the case which they had argued many times before and the conviction that prohibition could not be made successful in the communities they represented. These communities were for the most part cities in the North. But in their opposition to the Amendment the spokesmen of these cities were joined by a small company of old-fashioned Democrats, personally dry, from the dry South.

It was Mr. Small of North Carolina who insisted that his own state, believing in states’ rights, could not consistently claim the right to establish a standard for other states,<sup>18</sup> and Mr. Slayden of Texas who warned the House that it ought not to place a contentious question in the Constitution where any change was subject to the veto of one quarter of the States.<sup>19</sup> But the sharpest attack on the Amendment and perhaps the clearest statement of the traditional Southern point

<sup>17</sup>*Congressional Record*, 65th Congress, 2d Session, p. 438.

<sup>18</sup>*Ibid.*, p. 434.

<sup>19</sup>*Ibid.*, p. 439.

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of view came from a gentleman no longer identified with this side of the question—Mr. Heflin of Alabama.<sup>20</sup>

Describing himself as a dry whose devotion was proved by years of service, Mr. Heflin raised the question of whether it would help the cause of prohibition to impose this law upon states which were unwilling to accept it of their own volition. "The question is: Will we be patient and tolerant enough to accord to other states the right to settle the whisky question as we ourselves settled it through the rights and powers reserved to the states? Gentlemen, are we willing to take away from the state that sovereign power without whose exercise we would not now have prohibition in any state in the Union, and, in taking that power away, surrender forever the right and power of the state to control its own domestic affairs?"

In Mr. Heflin's judgment, no emergency had arisen which would justify interference by the federal government in the time-honored prerogatives of the states. Not only would this interference be unwarranted. It would be unwise. "All candid people must admit that the wisest and best way to handle the whisky question is through the exercise of the police power of the state." The state was the natural unit for control of purely domestic questions of this sort. Standards varied in different states. Public opinion varied. Some states wanted prohibition. Well and good: "When you get prohibition that way you have a strong and sympathetic public sentiment to sustain the state in its action." But the proper process was one of education and free choice; the goal could not be reached "by depriving the people of the states of the right and power to do that

<sup>20</sup>*Congressional Record*, 65th Congress, 2d Session, pp. 457-458.

which they can do and do more wisely and effectively than can the federal government."

Finally, unwise and unwarranted, this proposal seemed also to Mr. Heflin to be fraught with danger. For it seemed to him in 1917 to foreshadow the possibility of open resistance by reluctant states. "Why, Mr. Speaker, in 1776 the thirteen colonies took up arms against the mother country because they were denied the right to shape their own domestic policies and to manage as each colony thought best its own domestic affairs. . . . Mr. Speaker, I regret to see that some gentlemen here from the South in their enthusiasm for certain federalistic theories on prohibition do not seem to realize that we are treading on dangerous ground."

The House voted, a few hours later. By a majority of 282 to 128 it overrode the last defenders of the dying theory of states' rights and adopted the Amendment.<sup>21</sup>

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It is one of the anomalies of the story of prohibition that those sections of the country which were ultimately to show themselves most bitterly opposed to this decision paid least attention to it at the time that it was made.

This was a moment of triumph for the drys. The wets seem scarcely to have observed their own defeat. It is difficult to find any trace of organized protest against the Eighteenth Amendment either during 1917, when Congress was debating it, or for some time thereafter.

No memorials were adopted by the state legislatures petitioning Congress to change its mind. No demonstra-

<sup>21</sup>The vote of the House on the Amendment will be found in Appendix C.

tions of hostility took place in the wet centers of the country. The press of the larger cities reflects small interest in the question, either in its letter columns or its news. During the whole period of four months which intervened between action by the Senate and action by the House, when it might have been expected that the opponents of this change would do their best to block action or delay it, the columns of the *New York Times* reveal only eight brief items of news concerned with the Amendment and a single letter of protest from one indignant reader.<sup>22</sup>

Even a year later the fact that Congress had actually adopted the Eighteenth Amendment and referred it to the states for action seems scarcely to have penetrated to the consciousness of such centers of potential opposition as New York. In this year, 1918, Alfred E. Smith was running as a candidate for Governor against Charles S. Whitman, with New York's action on the Amendment still in doubt. This would seem to have presented an opportunity for a memorable debate on the issue of prohibition. Yet, despite this opportunity, Mr. Smith seems to have made his campaign on the issue of public utility regulation and Mr. Whitman on the issue of Tammany Hall and Mr. Smith's appointments as Sheriff of New York. There is nothing in the *Times* to indicate that from one end of the campaign to the other either candidate so much as mentioned the word "prohibition" in a single campaign speech.

The obvious explanation of this lack of interest during 1917 and 1918 lies in the fact that during these two years a still larger story absorbed the interest of the nation.

<sup>22</sup>*New York Times*, August 4, November 9, 15, and 23, December 3, 10, 11, 12, and 16, 1917.

On June 12, 1917, when the Judiciary Committee of the Senate favorably reported the Eighteenth Amendment and the *Times* was recording this news on page 13, the first American troops were on their way to France, the Italians had launched their offensive on the Trentino, and the British were attacking south of Ypres.

On July 31st, when debate on the Amendment had begun in the Senate and the *Times* found a place for it in an inside column on page 5, the Battle of Flanders was in progress, Kerensky was experimenting with a new government in Russia, and the German fleet had mutinied at Wilhelmshaven.

In August, September, October, and November, while the Sheppard resolution was marking time after its adoption by the Senate, and its enemies were plainly neglecting an opportunity to rouse opposition to its passage in the House, the French were attacking at Verdun, a British army was marching into Palestine, the Germans were in retreat from the Chemin des Dames, the Austrians were driving into Italy, the Bolsheviks were overthrowing the Kerensky government in Russia, the second Liberty Loan was being raised in the United States, and the first American troops had faced the fire of German guns in France.

Certainly in these circumstances it would have been idle to expect the American public to keep alive and clearly focused its interest even in so large a question as national prohibition.

The war not only shifted the attention of the American public away from prohibition. The intensity of public interest in the war permitted those Americans who were opposed to action on this question to believe in some vague way that the whole agitation for prohibition, like the war itself, was something transient,

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incidental to an emergency, and in due time bound to disappear.

It was this feeling which unquestionably accounts for the insistence by wets and even lukewarm drys on a time-limit of six or seven years on the process of ratification. Whatever Congress itself might do, in the interest of war efficiency and under the stress of war emotion, the fact remained as a check on war excitement that the opposition of any thirteen states was enough to block adoption of the Amendment.

It was the mistaken notion of the opponents of prohibition that thirteen hostile states could hold out comfortably for seven years.

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It was on January 8, 1918, in the fourth week following the action of Congress, that the first state ratified the Eighteenth Amendment. This state was Mississippi. Its action was prompt and overwhelming. Within fifteen minutes after the Governor of the state submitted the question to the legislature, both Houses had arrived at their decision.<sup>23</sup> There was no debate. The roll call was impressive. A total of 122 votes was cast in favor of ratification against 8 votes opposed.

This was an auspicious start, and it soon became apparent that there were certain forces operating in favor of ratification which had not been assessed at full value by the wets who put their faith in the effective opposition of a handful of reluctant states.

In the first place, these gentlemen overlooked the fact that the battle was now to be fought in the state capitals and that it was precisely in the state capitals

<sup>23</sup>Associated Press dispatch, Jackson, Miss., January 8, 1918.

that the Anti-Saloon League and its allied organizations had been functioning most effectively for more than twenty years.

The Anti-Saloon League understood the methods of state legislatures. It knew how to swing pivotal votes when they were needed. Mr. Wheeler has described how this was done in several cases during the fight over ratification which had now begun.<sup>24</sup> The opponents of the law, meantime, had no such effective organization. In fact, they were not organized at all. The only organized opposition to ratification came from the brewers and distillers. The brewers were under fire as pro-German. The distillers had been outlawed for the duration of the war. Ordinary people who were neither brewers nor distillers, but who were opposed to prohibition on principle or as a matter of personal taste, had no organization to represent them at the state capitols, no lobby and no leaders.

In the second place, it soon became apparent that the war would play a positive part and not merely a negative part in the ratification of the Amendment. For while the war overshadowed the Amendment and kept it from becoming the burning issue which it might otherwise have been, the war also served effectively to identify patriotism with the cause of prohibition.

Canada was going dry in 1918, setting a persuasive example as our senior partner in the war for the United States to follow.

The United States itself was going dry, even in advance of the Eighteenth Amendment and without its aid, for the same reason which prompted action in the case of Canada: namely, for the purpose of conserving food. Under the Food Control Law adopted in August,

<sup>24</sup>New York *Times*, April 1, 1926.

1917, the distilleries were already closed. Now, in September, 1918, the government decided to close the breweries as well as the distilleries, partly because of a drought which had damaged crops and partly because of a labor shortage and the necessity of drafting more men for the army.<sup>25</sup>

Finally, in this same month—September, 1918—Congress gave its approval to a plan for “war-time” prohibition on a national scale. Ironically enough, the bill carrying this provision did not become a law until fourteen days after the war was over and did not actually take effect until the seventh month of peace. Nevertheless, the approval of the proposal by Congress precisely at the time when the state legislatures were acting on the Eighteenth Amendment once more linked the cause of prohibition with the war.

This cause already had effective leadership. It had the momentum of the gains which it had made while the nation was at peace. It had the precedent of some form of prohibition adopted in twenty-six states before April, 1917, and in nine new states during the war period.<sup>26</sup> It had the support of many thousands of devoted friends who did not lose their interest in it merely because the government of Russia was falling or the French were attacking at Verdun. It had the prestige of an overwhelmingly favorable vote in Congress. It had the assistance of the bright bonfires which the Anti-Saloon League now began to build behind various state legislatures which seemed reluctant to take action or more interested in what was happening in Europe.<sup>27</sup> The net result of all these factors was a

<sup>25</sup>New York *Times*, September 7, 1918.

<sup>26</sup>Cf. Appendix A.

<sup>27</sup>Wayne B. Wheeler, New York *Times*, April 1, 1926.

prompt and favorable vote even in many of the wet states and the completion of the process of ratification in an almost incredibly short time.

It was on January 8, 1918, that Mississippi ratified the Amendment. During the same month Virginia, Kentucky, South Carolina, and North Dakota added their vote to Mississippi's. Eight more states took action before the end of spring. Two states voted favorably in the fall; and twenty states added their approval suddenly in the first fifteen days of January, 1919.

This brought the total to thirty-five. At 10:32 on the following morning—January 16, 1919—the upper House of the Nebraska Legislature voted for ratification by the comfortable majority of 31 to 1, and three quarters of the states had fallen into line.

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The process of ratification was complete. The battle in the state legislatures had ended in a rout. Prohibition took its place in the Constitution of the United States. The drys had scored their triumph. The wets have never to this day agreed that the test of strength was fairly staged and that the Eighteenth Amendment was ratified with the declared approval of a majority of the American people. There are three chief points which they still cite in support of this contention.

In the first place, they insist that ratification was the result of war psychology and the identification of patriotism with prohibition as a means of saving food. They insist that the war was at all times dominant in the discussion of the Amendment, from the day it appeared before the Senate down through the debate on the question of ratification in the states, and that

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without the war the Amendment would never have been adopted.

In the second place, they insist that the quarrel over prohibition was in large part a dispute for power between rural districts and urban districts, and that in this dispute the rural districts had more than their due share of representation in the state legislatures which ratified the Eighteenth Amendment.

It is impossible to dispute this argument successfully, in so far as it applies to many large industrial states. In New York, for example, one voter in rural Putnam County had as much representation in his State Assembly on the question of ratification as four voters in Rochester, five voters in Syracuse and as many as seven voters in certain districts of New York City.<sup>28</sup> Similar conditions existed (and still exist) in other industrial states. In Michigan one voter in rural counties like Antrim, Alpena, Livingston and Midland had as much representation in the State House of Representatives as two and a half voters in Detroit.<sup>29</sup> This situation, however, was not produced by prohibition. Prohibition simply profited in certain states from the traditional methods by which the American people achieve self-government.

In the third place, the opponents of prohibition insist that the Eighteenth Amendment was never ratified in the sense that either of the major parties first declared itself in favor of such action at a national convention and then submitted the question to a popular vote. Obviously nothing of the sort happened. Neither the Republican nor the Democratic party had ever declared itself in favor of national prohibition.

<sup>28</sup>*New York State Manual, 1919, pp. 577, 578, 590.*

<sup>29</sup>*Michigan Manual, 1919, pp. 822-823.*

No President had ever been elected on this issue. No state except Ohio ever submitted the question of ratification to a popular vote. In Ohio a small majority declared against ratification,<sup>30</sup> though the state itself had recently been voted dry. In no other state did any voter go to the polls to cast a ballot on the question. All this is obvious. The reply made by the drys is that the Amendment was ratified in strict accordance with the provisions of the Constitution.

These are the three chief points which the wets cite in support of their contention that the Eighteenth Amendment never had the sanction of the country as a whole. A different set of arguments is available to the drys.

They can point out, first, that the Eighteenth Amendment was ratified not only by the twenty-six states which had adopted some form of prohibition as their policy before the war, but also by twenty others, including such traditionally wet states as New York, New Jersey, and Wisconsin.<sup>31</sup>

They can point out, second, that the vote in most of the legislatures of these states was overwhelmingly in favor of ratification; that in fifteen states it was a unanimous vote either in one House or both; and that only in five states—New York, Illinois, Wisconsin, Louisiana, and Pennsylvania—was it even close.

They can point out, finally, that more than 80 per cent of the members of all the state legislatures in the country voted in favor of ratification, and they can insist that not even war psychology explains a vote so heavily one-sided.

<sup>30</sup>New York *Times*, December 18, 1919.

<sup>31</sup>The votes of the forty-six state legislatures which ratified the Eighteenth Amendment will be found in Appendix D.

With this argument, however, we merely return to the point from which we started, and the contention of the wets that this is just what happened. For it is precisely the one-sidedness of the vote, the haste with which it was taken, the failure to ask for the guidance of popular referendums, and the heavy emphasis on prohibition as good patriotism which seem to the wets to supply convincing proof that the state legislatures were stampeded into action under pressure of the war.

No method will ever be devised for ascertaining how much truth lies in this argument and how much in the argument used in rebuttal by the drys: their insistence that the war merely added pace to a process which would inevitably have reached the same conclusion. The war played a part. That much is certain. How large a part, wets and drys will continue to debate as long as the question interests them.

Meantime, the importance of one influence wholly remote from the war ought not to be lost sight of. Whatever immediately effective political power was exercised in this controversy was exercised by the drys. From first to last the case for ratification of the Amendment was presented in the state capitals by men who could claim to speak for millions of organized voters, whereas the case against ratification was presented for the most part by individual objectors who represented only the force of their own convictions, eloquently expressed, but less persuasive to the average member of a legislature than a visible bloc of a thousand, five thousand, or ten thousand votes.

Nothing of this sort could be offered by the opponents of ratification, now that the brewers were laid low and the burden of opposition rested on outsiders. For even after the end of the war and a revival of public

interest in domestic questions, there was no leadership capable of uniting an unorganized opposition overnight into a movement formidable enough to interest a state legislature. Down to the end of the story this opposition remained scattered, ineffective, and perpetually out of breath.

A mass meeting was held in Madison Square Garden in New York City to denounce the adoption of the Eighteenth Amendment.<sup>32</sup> It cheered to the echo the demand that this law be repealed. But when the meeting was over, it was over. A parade of twenty thousand people marched through the streets of Baltimore on a hot day in June,<sup>33</sup> but when it had passed the grandstand it disbanded. A press campaign in opposition to the Amendment was begun in the East by a hastily organized association of opponents of the law; but the ineffectiveness of the plans which these gentlemen thought up may be judged from their proposal that a day of protest should be set aside, to be known as national "Daisy Day," on which all opponents of prohibition would wear this flower in their button-holes.<sup>34</sup>

More serious opposition developed in the ranks of union labor, which had what these other movements lacked: real organization. At its Atlantic City convention in June, 1919, the American Federation of Labor denounced the adoption of war-time prohibition and demanded modification of the Eighteenth Amendment.<sup>35</sup> Three days later this protest was carried to the doors of the Capitol in a stormy and spectacular demonstration

<sup>32</sup>New York *Times*, May 25, 1919.

<sup>33</sup>Associated Press dispatch, Baltimore, June 2, 1919.

<sup>34</sup>New York *Times*, June 23, 1919.

<sup>35</sup>*Ibid.*, June 12, 1919.

of ten thousand union workmen which lasted for three hours.<sup>36</sup> Meantime the Central Federated Union in New York had urged its affiliated branches to poll their members on the question of a strike, with the slogan of "No Beer, No Work."<sup>37</sup> This slogan spread to other states, and for a time the movement in favor of direct action by organized labor assumed formidable proportions.

In the end it petered out. No strike took place. Organized labor did its work and got its beer, but not from the hands of Congress.

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This was the last gesture. The fight was over, not in the sense that the wet cities of the country accepted the new law as binding upon their future conduct, for there is nothing in the record to suggest this compliance on their part, but in the sense that the last ineffective effort to alter the decision of the legislatures now collapsed. From this point forward, the opponents of prohibition put what faith remained to them not in the legislatures but in the courts. Once more they were doomed to disappointment.

Meantime, for the friends of prohibition there remained only the task of consolidating their gains by the enactment of a law for the enforcement of the new Amendment so speedily written into the Constitution. It was a task which found them well prepared. On the same day that Nebraska became the thirty-sixth state to ratify the Amendment, the Anti-Saloon League an-

<sup>36</sup>New York *Times*, June 15, 1919.

<sup>37</sup>*Ibid.*, February 12, 1919.

nounced that it had already completed plans for an enforcement measure.<sup>38</sup>

This measure was introduced in the House of Representatives by Mr. Volstead of Minnesota on May 27, 1919, carrying provisions for the enforcement of both war-time prohibition, now about to become operative on July 1st, at the beginning of the seventh month of peace, and of constitutional prohibition, as established by the Eighteenth Amendment.

A minority of the Committee on the Judiciary in the House denounced this measure, demanded the repeal of the war-time law on the ground that the war was long since over and insisted that the provisions for constitutional prohibition were too harsh ever to be effectively enforced.<sup>39</sup> This protest went unheeded. The drys were in command. There was no challenging their power.

So foregone was the conclusion that the bill would be adopted precisely in the form in which the Anti-Saloon League wished it to be adopted that during most of the debate only a few members of the House took any part in the discussion on the floor. Certain amendments were actually adopted or rejected by votes as small as 26 to 14, 48 to 4, and 41 to 6,<sup>40</sup> with a handful of drys in command of the situation, and a few wets on the mourners' bench. On the final question of adoption the House turned out for the sake of the record and by a vote of 287 to 100, approximately the same vote as the vote on the Amendment, approved the bill and sent it to the Senate.

There one interesting change was made in it: the

<sup>38</sup>*New York Times*, January 17, 1919.

<sup>39</sup>*Ibid.*, July 8, 1919.

<sup>40</sup>*Congressional Record*, 66th Congress, 1st Session, pp. 2968, 2964, 2966.

insertion of a provision guaranteeing the farmer's unquestioned right to possession of sweet cider which would later turn to hard;<sup>41</sup> but for the rest, no significant change was made in the bill; the Senate's debate was listless; and after two days of almost casual discussion, during which the hope of the wets sank to a vanishing point, the Volstead bill was adopted by the Senate without even the formality of a roll-call vote.<sup>42</sup>

For one brief moment the hope of the wets flared into flame again. This was on October 27th, when President Wilson suddenly returned the bill with his veto, to the astonishment of the Anti-Saloon League and of Congress.<sup>43</sup> The stated ground for this veto was the fact that Congress had lumped war-time prohibition with constitutional prohibition, that the emergency of the war had long since passed, and that this section of the law should be repealed. To this comment the President added, speaking more generally: "In all matters having to do with the personal habits and customs of large numbers of our people, we must be certain that the established processes of legal change are followed. In no other way can the salutary object sought to be accomplished by great reforms of this character be made satisfactory and permanent."

Whether this comment implied disapproval by Mr. Wilson of that section of the bill dealing with constitutional prohibition as well as war-time prohibition has subsequently become the subject of lively disagreement. It is an interesting but academic point.

For within two hours of the time when the President

<sup>41</sup>*New York Times*, September 5, 1919.

<sup>42</sup>*Congressional Record*, 66th Congress, 1st Session, p. 4908.

The text of the Volstead Act will be found in Appendix E.

<sup>43</sup>*New York Times*, October 28, 1919.

sent his veto message to Congress, the House overrode his veto by a vote of 176 to 55, and on the next day the Senate followed suit.

It was the end of the road. An experiment to be described a decade later by another President as noble in motive and far-reaching in purpose was now about to start.

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## CHAPTER III

### The Law in Action

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IT is here at last—dry America's first birthday,” said a statement given to the press by the Anti-Saloon League of New York on January 15, 1920. “At one minute past twelve to-morrow morning a new nation will be born. . . . To-night John Barleycorn makes his last will and testament. Now for an era of clear thinking and clean living! The Anti-Saloon League wishes every man, woman and child a happy Dry Year.”<sup>1</sup>

It is difficult now to re-create the mood in which this adventure started, but there can be no doubt of the faith of the prohibition leaders that liquor was effectively banished from the United States by the Eighteenth Amendment. There were no reservations in the assurance with which these leaders faced the future. It did not seem to them then, in the hour of their triumph, that this law might be difficult to enforce, that too much must not be expected of it all at once, that the results of its first year or even its first decade must be viewed with leniency, and that the nation would be fortunate if a law so revolutionary were effectively established in a generation.

On the contrary, the dry leaders were plainly ready to date the dawn of prohibition in the United States from

<sup>1</sup>New York *Herald*, January 15, 1920.

the day when the law became effective, and it is not difficult to understand their confidence. Having championed prohibition for thirty years as a solution of the liquor problem, their faith was too deeply founded to harbor skepticism. They believed that the law could be enforced and would be enforced, promptly, effectively and to the immediate advantage of the country. Even so experienced a campaigner as Mr. Wheeler saw no reason why the government should encounter any real difficulty in enforcement. "I think five millions a year appropriated to enforce this law would be ample," said Mr. Wheeler in a letter read on the floor of the Senate at this time, "and if the liquor dealers suddenly become law-abiding it can be reduced when the need disappears."<sup>2</sup>

So authoritatively optimistic were the drys, and so completely routed were the wets, that most of the discussion of prohibition which took place at this time was concerned less with the problem of enforcement than with the effect which enforcement would have on the business and social life of a country suddenly changed from wet to dry.

Various manufacturers of luxuries and near-luxuries were interviewed by the press on the effect which this change would have on the sale of jewelry, furs, and motor cars. The Actuarial Society of America debated the question of insurance rates in the light of a decreased consumption of alcohol as against a probable increase in the use of sugar.<sup>3</sup> The *New York Times* quoted a representative of the arts who predicted that prohibition would be followed by a great boom in the music trade.<sup>4</sup> Only the California grape growers seemed to be

<sup>2</sup>*Congressional Record*, 66th Congress, 2d Session, p. 5655.

<sup>3</sup>*New York Times*, October 24, 1919.

<sup>4</sup>*Ibid.*, May 9, 1920.

discouraged. Congress had been told that prohibition would bankrupt thousands of California farmers, and to the bitter end the Grape Growers' Protective League fought the constitutionality of the law with every device at its command, going so far as to obtain a writ of injunction against the action of the California legislature in ratifying the Amendment.<sup>5</sup> When the law finally took effect, one vineyard owner killed himself because the outlook seemed so dark.<sup>6</sup>

In January, 1920, the grape growers of California do not seem to have foreseen the bonanza that lay just around the corner.

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It was at midnight on January 16th that the law took effect and twenty-four hours later that the public received its first enforcement news. "Four stills, two in Detroit and two in Hammond, Indiana, were raided yesterday in the government's crusade against violators of the Volstead Act," said an Associated Press dispatch from Chicago on January 17th. "The raided stills, according to A. V. Dalrymple, head of the Central West prohibition forces, were operating on a major scale."

The country was dry. Prohibition had come. The Constitution itself forbade the manufacture of intoxicating liquor. It seems clear, however, that there was no sharp break between the old and new, in the sense that manufacture ceased abruptly for a time and only at a later date did illicit stills begin to flourish. The stills were present from the start, obviously prepared to

<sup>5</sup>Associated Press dispatch, San Francisco, January 14, 1919.

<sup>6</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 20.*

carry on the business of manufacture without interruption.

Such a development was logical in the circumstances. Prohibition did not suddenly develop the illicit still. Moonshining antedated the Eighteenth Amendment by many years. It was carried on in the backwoods sections of the country by men who sought to evade the payment of a government tax and carried on so extensively that over a period of forty-three years from 1876 to the date when the Eighteenth Amendment became effective a total of 66,794 stills were seized by agents of the Bureau of Internal Revenue.<sup>7</sup>

What happened now was merely that the illicit still, which had hitherto been merely a mechanism of tax-dodging, became the main source of production of hard liquor and under the stimulus of a new market flourished on a more ambitious scale. In the forty-three years from 1876 to 1919 the government had seized an average of 1,553 stills a year. In the first six months of 1920, following the date when the Eighteenth Amendment became effective, the government seized 9,533 stills<sup>8</sup>—an increase, for a six months' period, of 1127 per cent.

Moreover, prohibition had this second result on the production of liquor by illicit stills. If it established a new and wider market for the still large enough to operate on a commercial scale, it also popularized the small portable still, designed to cheat the law through a process of home manufacture.

<sup>7</sup>*Annual Reports of the Commissioner of Internal Revenue; Prohibition Commissioner Woodcock, New York Times, October 12, 1930; Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 63.*

<sup>8</sup>*Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 64.*

On January 28th, the twelfth day of national prohibition, a force of federal agents set out from the Customs House in New York City in what was described as "the greatest campaign ever conducted against violators of the prohibition law," a phrase which was destined to become familiar. The goal of this drive was a round-up of one-gallon stills which, even as early as the second week of national prohibition, were thought to be in wide use throughout the city.

"Any person caught with one of these stills in his possession will be proceeded against at once," said the Federal Prohibition Administrator in New York.<sup>9</sup> "I advise everybody who has one to bring it to my office immediately." On the following day, no stills having been surrendered, the Federal Administrator announced that his men would promptly begin to search the city for them.<sup>10</sup> For this purpose he had at his disposal a staff of 178 agents to distribute among 1,278,431 homes.

Both the commercial still and the small still for kitchen use thus made their appearance promptly, in the first two weeks of prohibition. They date from the first days of this experiment, playing a part in the problem of enforcement in dry states as well as wet states. In February, 1920—the first full month of national prohibition—103 stills with an aggregate capacity of 7,194 gallons were seized and destroyed by federal agents in Alabama.<sup>11</sup> In North Carolina, South Carolina, Virginia, Kentucky, and Tennessee, the number of commercial stills seized by federal agents assigned to this district averaged for each state 157 stills a month.<sup>12</sup>

<sup>9</sup>New York *Times*, January 29, 1920.

<sup>10</sup>*Ibid.*, January 30, 1920.

<sup>11</sup>Associated Press dispatch, Talladega, Ala., March 13, 1920.

<sup>12</sup>Associated Press dispatch, Louisville, January 28, 1921.

From the point of view of effective enforcement of the law, the obvious problem presented by a still was the difficulty of finding it when it was hidden away in miniature form in a city home or in its commercial form concealed in some thicket or some hollow so inaccessible placed that even the owner of the land on which it stood might be unaware of its existence.

A case in point occurred during these early months when a still with a capacity of 130 gallons daily was found operating five miles north of Austin, Texas, on the farm of Senator Morris Sheppard, author of the Eighteenth Amendment.<sup>13</sup>

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If the question of illicit stills raised a problem for the government, there is nothing in the record to suggest that the prompt appearance of this problem tempered the optimism shown by officials of the Prohibition Bureau<sup>14</sup> in their early statements to the press.

The Treasury Department had brought to Washington, as the first Prohibition Commissioner in the history of the United States, an Ohio Lawyer and a former member of the Ohio Legislature—John F. Kramer, a devoted dry. This man was not a party boss. He controlled no votes. He had no experience in the business of party plunder. He was an unknown in Washington, a disinterested outsider, a lifelong friend of

<sup>13</sup>New York *Times*, September 7, 1920.

<sup>14</sup>“Prohibition Bureau” did not become the official title of the government’s enforcement service until March 3, 1927. Previous to this time the service was known as the “Prohibition Unit.” In order to avoid confusion, however, the phrase “Prohibition Bureau” is used throughout this book.

prohibition, and a champion whose first announcement to the press breathed confidence and fire: "This law will be obeyed in cities, large and small, and in villages, and where it is not obeyed it will be enforced. . . . The law says that liquor to be used as a beverage must not be manufactured. We shall see that it is not manufactured. Nor sold, nor given away, nor hauled in anything on the surface of the earth or under the earth or in the air."<sup>15</sup>

Nevertheless, despite the finality of this statement and the confidence with which it bristled, it rapidly became apparent that the law would encounter a variety of problems which had not been anticipated by its authors. An immediate expansion of the business of illicit distilling was one of these problems. Others cropped up with a disconcerting promptness which is evident in the calendar of the first official efforts at enforcement.

*January 16:* The law took effect.

*January 31:* Congress was informed that wholesale smuggling of liquor was in progress on the borders. In a letter to the Appropriations Committee of the House of Representatives, George W. Ashworth, director of the Customs Service, reported that only "an infinitesimal quantity" of this liquor was being seized, advised Congress that it had not adequately prepared to meet the problem, and asked for the immediate appropriation of an additional \$2,000,000.<sup>16</sup>

*February 19:* Two agents of the Internal Revenue Department engaged in prohibition work were arrested at Baltimore on charges of corruption.<sup>17</sup>

<sup>15</sup>New York Sun, January 4, 1920.

<sup>16</sup>House Document No. 641, 66th Congress, 2d Session.

<sup>17</sup>Associated Press dispatch, Baltimore, February 19, 1920.

*February 28:* Two carloads of patent medicine containing 55 per cent of alcohol were seized in Chicago by government officials.<sup>18</sup>

*March 10:* Federal agents in Brooklyn began a round-up of druggists accused of selling whisky without a prescription from a doctor.<sup>19</sup>

*March 19:* The lower House of the Mississippi Legislature voted down a bill proposing to appropriate state funds to aid the federal government in suppressing stills. Major W. Calvin Wells, federal Prohibition Commissioner for the state, urged the members of the Legislature to reveal the sources of the liquor which he said was being sold to state officials "openly and brazenly."<sup>20</sup>

*May 8:* The federal prohibition office in New York City complained that it was not receiving the support of the New York police. "We are making a great many arrests, but the coöperation of the local authorities is absolutely necessary. We don't get that coöperation."<sup>21</sup>

*May 18:* A deputy collector of Internal Revenue in New York City engaged in prohibition work was arrested on charges of corruption.<sup>22</sup>

*May 24:* Dr. Charles W. Eliot of Harvard University declared in an address at Boston that people with money and social position were helping to defeat the law. "These so-called 'best people,' who are doing so much to interfere with prohibition enforcement, are causing a great deal of trouble in nearly all parts of the country,

<sup>18</sup>Associated Press dispatch, Chicago, February 28, 1920.

<sup>19</sup>New York *Times*, March 11, 1920.

<sup>20</sup>Associated Press dispatch, Jackson, Miss., March 19, 1920.

<sup>21</sup>New York *Times*, May 9, 1920.

<sup>22</sup>*Ibid.*, May 19, 1920.

and they are teaching lawlessness, especially to the young men of the country.”<sup>23</sup>

*June 2:* Captain Hubert Howard, federal Prohibition Administrator for Illinois, estimated that 300,000 spurious prescriptions had been issued by Chicago physicians since the law became effective.<sup>24</sup>

*June 6:* The special train of the Massachusetts delegation to the Republican National Convention was raided by prohibition agents who seized its stock of liquor.<sup>25</sup>

*June 17:* District Attorney Clyne reported that the dockets of the federal courts in Chicago were congested with prohibition cases. “Between five hundred and six hundred cases are now awaiting trial.”<sup>26</sup>

*June 18:* The Department of Justice announced that it would be unable to employ special attorneys to handle prohibition cases because of the failure of Congress to provide the necessary funds. “District attorneys have notified the Department that they cannot enforce the Volstead Act without assistance and the Department faced the alternative of drafting men from other branches of work or leaving the district attorneys without aid in handling the mass of cases rapidly accumulating in the various districts.”<sup>27</sup>

*June 30:* San Francisco was reported to be wide open in honor of the Democratic National Convention. Acting Mayor McLernan later said: “Everybody knew it. The roof of the house was off, and San Francisco was entertaining.”<sup>28</sup>

<sup>23</sup>*New York Times*, May 25, 1920.

<sup>24</sup>*Ibid.*, June 3, 1920.

<sup>25</sup>*Ibid.*, June 7, 1920.

<sup>26</sup>*Ibid.*, June 18, 1920.

<sup>27</sup>Associated Press dispatch, Washington, June 18, 1920.

<sup>28</sup>*New York Times*, October 7, 1920.

*July 2:* Jail sentences aggregating fifty-nine months and fines totaling \$85,000 were imposed on officials of two companies in New York City, found guilty of withdrawing 25,000 gallons of industrial alcohol which were diverted to beverage purposes.<sup>29</sup>

*July 25:* A Washington dispatch to the *New York Times* reported: "Federal authorities are greatly concerned over the failure of state and city law officers to coöperate with prohibition agents. The fact that the anti-liquor laws are being flouted in many of the greatest cities of the country causes chagrin and disappointment to the government."<sup>30</sup>

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So reads a page from the record of the first six months of prohibition. One point it shows clearly. Even within as brief a time as half a year every major question which is now prominent in the problem of enforcement had already raised its head.

The first important case involving the diversion of industrial alcohol had come to trial. The first warning of congestion in the courts had appeared in the form of a federal docket five hundred cases behind schedule in Chicago. The first evidence of lack of coöperation on the part of local authorities had reached the public in the lassitude of the New York police, the unwillingness of the Mississippi Legislature to contribute money for enforcement, and the complaint of federal authorities in Washington that they were being asked to shoulder the whole burden.

Meantime stills were flourishing both in the cities

<sup>29</sup>*New York Times*, July 3, 1920.

<sup>30</sup>*Ibid.*, July 25, 1920.

and in the rural districts. Patent medicine was under suspicion. Druggists were being raided. Smuggling on the borders was already a serious enough problem for the Customs Service to report that only a fraction of the liquor run across the border had been seized. The first cases involving a new type of corruption in the service of the government had reached the courts. The problem of insufficient funds had already compelled the Department of Justice to abandon plans to add special prosecutors to its staff. Dr. Eliot of Harvard was rebuking the best people for their complaisant revolt against the law; and both the Republican and Democratic conventions had furnished evidence that certain men in public life and public office were content to break the law while they were writing solemn planks on law enforcement.

All this had happened in six months, before the law had been in operation long enough for its enforcement officers to be handicapped by a defeatist propaganda launched by the wet press.

Within a half year's time a miniature "enforcement problem" had shaped itself precisely in the form in which the country was destined to debate it ten years later.

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There were various ways in which these early symptoms of trouble might be viewed. One realistic way was to recognize that difficulties which had appeared so promptly were likely to be inherent in the law itself; to concede that these difficulties probably could not be wished away by insisting that they were inconvenient; and to prepare a program bold enough and sufficiently far-reaching to permit a real attack on the problems of

enforcement before they became too formidable to handle. Another way was to ignore all this and to assume that these early difficulties were the work of a few malcontents who would soon retire from the field.

There were several reasons why this second theory was more attractive to the friends of prohibition than the first. For one thing, it honestly represented their convictions. The adoption of the Eighteenth Amendment found them reluctant to believe that this law would encounter any difficulties which were more than fleeting. The failure in the past of various state prohibition laws to measure up to expectations they had been able to understand and even to anticipate. There was always the ready explanation that the trouble lay not with the law itself but with the neighboring wet states whose efforts broke it down. Once there were no wet states, there would be no problem. For there would be no liquor to defeat the law. The possibility that abundant sources of liquor might be developed under cover, by an illicit industry strong enough to defy any efforts which the government was willing to expend, does not seem to have suggested itself to the sponsors of the Eighteenth Amendment as an alternative which needed to be considered seriously.

There was a second reason why the friends of prohibition preferred to believe that any early trouble was the result of sabotage rather than a warning of difficulties inherent in the law. Not only did they believe this to be true; it was obviously good tactics for them to say so. For to face the question of inherent difficulties was to raise the question of the wisdom of the law. To denounce the malcontents was merely to insist on public order.

At no stage of these early proceedings did the friends of prohibition raise before Congress or the country the question of what should be done about such matters as congestion in the courts, corruption in the government or the failure of the states to vote money for enforcement. Whatever difficulties had appeared they attributed to a conspiracy against the law and not to the law itself: "a vicious conspiracy," as the Anti-Saloon League put it, at the end of these six months, "to discredit and ultimately overthrow prohibition by violation and non-enforcement."<sup>31</sup>

Conspiracy could and should be punished. In the opinion of the Anti-Saloon League the right way to solve these problems was not to raise doubts about them, but to bring down the full force of the law on the heads of the conspirators. The courts had ample power to solve any problems which had yet appeared, but the courts were slow to act. Certain judges had shown themselves to be sufficiently severe. "The unstinted credit due them should not soften the weight of public condemnation justly deserved by those recreant judges, some of them in territory dry even before national prohibition became effective, who because of personal prejudice or for other reasons have so dealt with violators of the law as to make a mockery of the administration of justice."<sup>32</sup>

Satisfied with the law itself, ready to stand on Mr. Wheeler's estimate of five million dollars as ample for enforcement and convinced that it lay within the power of the courts to break up a wholly artificial conspiracy if they chose to act, the one appeal which the Anti-Saloon League addressed to Congress at this time was an

<sup>31</sup>New York *Times*, September 19, 1920.

<sup>32</sup>*Ibid.*

appeal for legislation which would make it possible to remove from the bench any judge who failed to impose stiff sentences on violators of the law.<sup>33</sup>

§

Powerful as were the courts, and reassuring as their power seemed to the Anti-Saloon League in 1920, the courts were at best one stage removed from the original factor in violations of the law: namely, illicit liquor. The courts, to be sure, could discourage the agents of a new liquor traffic by the infliction of harsh penalties if juries found these agents guilty. But the business of patrolling the traffic in illegal liquor, of organizing a large enough force to cope with it successfully, of detecting and arresting its chief agents, of producing evidence against these agents which would stick in court, and of providing enough courts to hear this evidence with reasonable promptness—all this was not the work of the courts but the work, first, of the legislatures which wrote laws and appropriated funds, and second, of the executive officials who administered the laws and spent the funds to obtain enforcement.

The central problem in destroying an illicit trade was plainly the problem of shutting off its sources of supply. There were five chief sources of supply for the illicit trade which sprang up suddenly in the first six months of 1920. It was easy to identify these sources and possible from the very start to appreciate what efforts would be required to suppress them. The problems which they presented could have been measured as accurately in 1920 as in 1930.

<sup>33</sup>Resolution adopted at a national conference of the Anti-Saloon League, *New York Times*, September 19, 1920.

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The first source was medicinal liquor. It was the least important source but the most obvious. The Eighteenth Amendment had forbidden the manufacture, sale, or transportation of intoxicating liquor for beverage purposes, but left the legality of liquor for medicinal purposes intact. In these circumstances there was certain to be a very considerable distribution of such liquor. This was not a matter of guesswork but of plainly demonstrated fact. By July 3, 1920, before prohibition was six months old, more than fifteen thousand physicians and more than fifty-seven thousand druggists and manufacturers of proprietary medicines and extracts had applied for license to prescribe and to dispense intoxicating liquor.<sup>34</sup>

How was the government to make certain that none of this liquor was so dispensed as to defeat the purposes of the law?

The government's first task was to check the prescriptions written by the doctors. Its second task was to supervise the druggists. It was not enough, for the effective enforcement of the law, to inspect the records from time to time. For the system by which the druggist obtained liquor made it easy for him to cheat the law, if he so desired, and still keep perfect records.

On presentation of his permit the druggist withdrew a certain quantity of whisky. By diluting this whisky he could double its quantity and dispose of half of it illegally. If the government wished to prevent this practice it must have enough inspectors to make certain that

<sup>34</sup>New York *Times*, July 4, 1920.

the whisky which the druggist sold was of the same quality as the whisky he received from the distilleries.

## §

The second source of supply was illegal beer. Under the terms of the Volstead Act, breweries, or cereal beverage plants, as they were now renamed, were forbidden to manufacture beer containing more than one half of one per cent of alcohol but permitted to manufacture beer with a lower alcoholic content. It was impossible, however, to manufacture legal beer of a lower alcoholic content without manufacturing an illegal product first. The process of making what now came to be known as near-beer involved the production of genuine beer with an alcoholic content of three or four per cent and then the de-alcoholization of this beer until it reached the legal limit.<sup>35</sup>

It was the obvious result of this method of production, the only method by which near-beer could be produced, that it opened a wide doorway to violations of the law. Under the Volstead Act breweries continued to manufacture real beer, precisely as they always had. The question of whether they would de-alcoholize this beer before they sold it was a matter of good faith on the part of the individual brewer plus what restraint the government could impose upon his methods of production.

No real restraint was possible without a large enough staff of agents to police places where near-beer was sold in quantity, as well as places where it was made. For it was a common practice of less scrupulous breweries

<sup>35</sup>Prohibition Commissioner Kramer, *New York Times*, April 27, 1921.

to supply distributors with alcohol which could be "needled" or "shot" into near-beer after it had passed the inspection of the government.

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The third source of supply was smuggled liquor. It was an important source, particularly in the early years of prohibition.

The problem may be simply stated. The length of the Atlantic, Pacific, and Gulf coasts of the United States is approximately 12,000 miles. The length of the land borders on the north and south is 3,700 miles. The length of the frontage on the Great Lakes and connecting rivers is 3,000 miles. The total distance vulnerable to smuggling by land and sea, given enough incentive to make smuggling profitable, is approximately 18,700 miles.

To prevent such smuggling, the government had in 1920 a force of 1,550 prohibition agents,<sup>36</sup> whose duties included not only the prevention of smuggling but all other matters pertaining to the law. There were also some 3,000 active customs agents in the field.<sup>37</sup> A limited amount of assistance could be expected of the Immigration Service, the Public Health Service and perhaps even the Federal Horticultural Board, which had agents on the borders for other purposes. Along the seacoast substantial help could be expected of the Coast Guard.

The problem of the government was complicated by three factors. First, these various services were wholly

<sup>36</sup>*Report of the Commissioner of Internal Revenue, Fiscal year ended June 30, 1920*, p. 33.

<sup>37</sup>*House Report No. 1581, 65th Congress, 3d Session.*

uncoördinated; second, their personnel was so meager that if the entire staff of 1,550 prohibition agents had been relieved of all other duties and placed along the borders and the seacoast, each agent would have had twelve miles to cover; third, the shore line of the United States is richly indented with deep coves, convenient creeks, and long stretches of deserted beach in close proximity to the largest cities; for example, on Long Island.

The important question was whether Congress and an administration now faced with the duty of enforcing a national prohibition law would create and maintain a border and coast patrol adequate to prevent the easy importation of illicit liquor.

The first six months of experiment in this direction had brought from the director of the Customs Service a sharp warning that only a fraction of the smuggled liquor had been seized.

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The fourth source of supply was industrial alcohol. It was a munificent source of supply for the reason that the experiment with federal prohibition happened to coincide precisely with the development of a large and varied chemical industry in the United States. Ten years earlier prohibition would have found this industry comparatively quiescent. By 1920 it was in the full swing of its post-war expansion, developing substitutes for German dyes, discovering new processes like the manufacture of rayon silk, and rapidly increasing the long list of industries which required alcohol for a wide variety of products ranging all the way from photographic films to anti-freezing mixture and shaving cream to smokeless powder.

In 1910 the entire production of denatured alcohol in this country had been less than 7,000,000 gallons. By 1920 it had jumped spectacularly to 28,000,000 gallons.<sup>38</sup> The problem of preventing any part of this 28,000,000 gallons from being diverted to illicit purposes was a problem not only in devising formulas which would make this alcohol undrinkable, but also in tracing the whole output through the hands of its successive owners from the time it left the special denaturing plants which manufactured it until it reached the ultimate consumer.

Unhappily, the government had no power under the law to go beyond the original purchase of any products manufactured.<sup>39</sup> Effective enforcement of the law required that the government be given this power, plus enough agents to make certain that at no point in the labyrinth of shippers and jobbers and manufacturers and wholesalers and retailers was alcohol sold to dummy companies which would in turn dispose of it to bootleggers.

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Finally, it was clear from the first day of national prohibition that illicit stills could be relied upon to furnish a large quantity of liquor and that the business of ridding the country of stills required an effective army of federal or state police.

A commercial still representing an investment of \$500 could produce from 50 to 100 gallons of liquor daily. As the Prohibition Bureau pointed out, this liquor could

<sup>38</sup>*Industrial Alcohol*, United States Treasury Department, 1930, p. 48.

<sup>39</sup>*Ibid.*, pp. 24-25.

be made at a cost of fifty cents a gallon.<sup>40</sup> It could be sold for three or four dollars a gallon at or near the place of manufacture. At minimum profit a still operating at full capacity would pay for itself in four days' time. There was little to lose in having it seized. Another could be purchased with the profits of the next four days. Meantime the base of operations could be shifted constantly in an effort to escape detection.

As for the small still in a private home: the problem here was Herculean. Not only could a portable one-gallon still be purchased on the open market for as low a price as six or seven dollars; in addition, the public libraries of the country carried on their shelves many books and magazines which discussed the art of distilling liquor with such commonplace utensils as wash boilers, steam cookers, and even coffee percolators.

The government itself had contributed to the existing literature on this subject a number of such pamphlets as Farmer's Bulletin No. 269 (1906), Farmer's Bulletin No. 410 (1910), Bureau of Chemistry Bulletin No. 130 (1910), and Department of Agriculture Bulletin No. 182 (1915), describing in detail and with complete simplicity the manufacture of alcohol from such familiar ingredients as apples, oats, bananas, barley, sorghum, sugar beets, watermelon, and potato culls. In the simplest form of manufacture, all the equipment needed to make an evil-tasting alcohol was a tea kettle, a quart of corn meal and an ordinary bath towel.

If the business of ridding the country of commercial stills was a battle with an unseen enemy over a wide front which was constantly shifting, the business of

<sup>40</sup>Prohibition Commissioner Haynes, *New York Times*, July 18, 1923.

putting an end to distilling in private homes was an effort such as no government had ever undertaken.

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Such were the potential sources of supply of a new traffic in illegal liquor. All that was needed to develop these sources and make certain that they would grow and prosper was a market for the goods so readily available. This market was assured in the circumstances in which the venture started.

For though the Eighteenth Amendment had now become the law of the land, there were large numbers of people who failed to accept this law as binding. In many urban sections of the country opposition to the method and philosophy of prohibition was deep-rooted. Most of the states with large industrial centers—New York, New Jersey, Pennsylvania, Massachusetts, and Connecticut in the East; Illinois, Missouri, and Wisconsin in the central section; California in the West—had refused to adopt state prohibition laws. In the large cities opposition was particularly stubborn, as the result both of a prevailing set of moral values different from moral values in the smaller towns and the influence of a rich strain of recent European immigration. Time and again the cities had shown their opposition in the past. While the Eighteenth Amendment was being considered by Congress and the states, San Francisco, St. Louis, St. Paul, Chicago, Cincinnati, Cleveland, Detroit, and Boston all voted on a proposal for state or municipal prohibition and all voted to reject it.<sup>41</sup>

<sup>41</sup>New York *Times*, November 7, 1918; *ibid.*; *Legislative Manual*, Minnesota, 1919, p. 624; New York *Times*, April 2, 1919; *Ohio General Statistics*, Vol. 5, p. 25; *ibid.*; *Michigan Manual*, 1919, p. 868; New York *Times*, December 17, 1919.

The question at this point is not whether opposition to prohibition before its enactment was wise or unwise, but whether this opposition persisted after the adoption of the Eighteenth Amendment with enough spirit to make it count as one of the problems in enforcement. On this point there can be no doubt. The federal Prohibition Bureau had itself complained at the end of its first half year of work that the law was being flouted in many of the largest cities<sup>42</sup> and the backwash of hostility in the industrial sections was already rising.

In this same half year the legislatures of New Jersey, New York, and Massachusetts adopted bills proposing to legalize light wines or beer, or both, despite the limitations in the Volstead Act.<sup>43</sup> The American Federation of Labor, with its constituency chiefly in the cities, reiterated its opposition to the law.<sup>44</sup> The Republican and Democratic parties, meeting at their national conventions in Chicago and San Francisco, showed themselves so well aware of the hostility to prohibition in the industrial states that they deliberately dodged the question of endorsing the Eighteenth Amendment in their platforms, though it was now a part of the Constitution and though they were specifically called upon for an endorsement.<sup>45</sup>

Nor did opposition to the Eighteenth Amendment, as a factor in the problem of enforcement, develop merely in those states which had hitherto been wet. A definite change had taken place in states which had hitherto been dry. For in many of these states people who had been able before 1920 to obtain alcoholic

<sup>42</sup>New York *Times*, July 25, 1920.

<sup>43</sup>*Ibid.*, March 3, May 25, May 7, 1920.

<sup>44</sup>*Ibid.*, June 19, 1920.

<sup>45</sup>*Ibid.*, June 11, July 3, 1920.

beverages by entirely legal means, in limited quantities or in limited percentages, now found themselves denied this legal access and therefore tempted to disobey the law.

Moreover, this substantial change had taken place. Hitherto these people living in dry states had been governed by laws which varied in their standards, their methods, and their severity entirely according to local taste. Alabama permitted the importation of limited quantities of intoxicating liquor at regular intervals twice a month. Mississippi permitted the manufacture of home-made wine. Michigan placed no limit on personal importation for personal use. Other states had other standards. In few states were the laws dealing with the difficult and long-standing problem of regulating liquor precisely alike. In some states they differed widely. In all states they followed local customs, theories and precedents. Now, however, people living in these dry states found themselves confronted suddenly by a system which imposed the same universal standard of judgment on every city, every town and every hamlet in the country.

The change could scarcely fail to raise new questions of large importance.

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This was the situation shaped by the first six months of the effort to enforce the law. Large problems had appeared. It is not necessary to describe these problems as insoluble, but it is perfectly clear that they transcended any estimate which assumed that this law could be enforced with a handful of agents, a little exhortation, and a casual appropriation of five million dollars. The friends of prohibition who took this optimistic view were

guilty of one fundamental misconception. They regarded the Eighteenth Amendment as a treaty of peace with the liquor traffic. It was, in fact, a declaration of unremitting war.

Only one agency of the government could make this war, could raise the forces needed to conduct it and equip these forces with the bold appropriations and the irresistible authority needed to suppress the ready sources of illicit liquor.

This agency was Congress. For while the legislatures of forty-six states had ratified the Amendment, many of these legislatures had never chosen hitherto to experiment with prohibition. Inevitably they looked to Congress to set the pattern of enforcement.

The history of national prohibition properly begins in the Capitol at Washington.

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## CHAPTER IV

### The Neutrality of Congress

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**C**ONGRESS had been sitting uncomfortably between the devil and the deep sea for some years when this adventure started. The brewers had constantly been making threats and issuing ultimatums. The Anti-Saloon League had promised prompt retaliation at the polls against Congressmen who blocked its program.

Time after time, for more than a generation, Congress had been asked to take sides in a bitter and endless dispute whenever it was forced to vote on a bill to place higher taxes on the liquor traffic, or a bill to bar liquor advertising from the mails, or a bill to prevent interstate shipments of liquor itself, or a bill to establish outright prohibition at the army posts, in the District of Columbia, or in other territory under federal control. Congress had had no respite from the problem. If it gave its support to the brewers, it invited reprisals from the Anti-Saloon League. If it gave its support to the Anti-Saloon League, it encountered the mailed fist of the brewers. By 1917 there were a good many members of both Houses who were weary of debating the liquor traffic, tired of choosing sides, and increasingly resentful at being forced to jeopardize their political security on an endless sequence of decisions.

So real was the resentment of Congress on this score

that unquestionably it played a part of some importance in the adoption of the Eighteenth Amendment. During the debate in the House on that occasion Mr. Heflin of Alabama suggested that certain members plainly intended to vote for prohibition merely in order to be rid of it. These gentlemen, he insisted, set too high a value on their own impatience. "No member of the House can dispose of this question simply by saying that he was tired of being bothered with it."<sup>1</sup> In the Senate Mr. Harding of Ohio had declared that it was "unwise, imprudent and inconsiderate to force the issue" while the war was on, but agreed that it would be pleasant, war or no war, to have it out of the way forever. "I want to see this question settled. I want to take it out of the halls of Congress and refer it to the people, who must make the ultimate decision."<sup>2</sup>

Now that the decision was made it seemed possible to hope for relief at last from the steady, unrelenting pressure of both wets and drys. Certainly the mood of Congress in January, 1920, seemed to reflect a belief that it had done its duty and that it would now thank everybody to bother it as little as possible with a question it had heard discussed too often.

## §

Evidence of this frame of mind is to be found in the record of Congress during the first critical six months following the date when the law became effective.

Congress was in session during all but the last few weeks of this period of half a year. It had met in December, 1919, and it remained in session until June, 1920.

<sup>1</sup>*Congressional Record*, 65th Congress, 2d Session, p. 458.

<sup>2</sup>*Ibid.*, 65th Congress, 1st Session, p. 5648.

It had an excellent opportunity to watch the first efforts at enforcement. It was in a good position to measure the difficulties which had appeared so promptly and to decide what action they required. It had seen the first signs of congestion in the courts. It had learned from the Customs Service that liquor was flowing easily across the borders. It had heard the complaint of the Prohibition Bureau that the law was being ignored in many of the larger cities and it had observed the failure of local authorities in certain districts to coöperate with federal officials.

This was the situation which confronted Congress. The extent of its interest in this situation may be judged from the fact that only six times in six months was prohibition referred to, even briefly, on the floor of either House of Congress.

Mr. Volstead made one speech in praise of the law, and Mr. Babka of Ohio one speech in opposition to it.<sup>3</sup> An impromptu attempt to repeal the Volstead Act by attaching a rider to an appropriation bill was defeated by a vote of 89 to 38.<sup>4</sup> Mr. Warren of Wyoming suggested in the Senate that a serious effort to enforce the law might ultimately cost as much as \$50,000,000 annually, whereupon Mr. Sheppard read into the record Mr. Wheeler's estimate that \$5,000,000 would be ample for the first few years, with the probability of a reduction later.<sup>5</sup> Late in the session, on June 1st, the Senate argued for ten minutes whether or not to believe newspaper reports of large-scale trading in forged certificates to take whisky out of bond.<sup>6</sup>

<sup>3</sup>*Congressional Record*, 66th Congress, 2d Session, pp. 8936, 9051.

<sup>4</sup>*Ibid.*, pp. 3472-3474.

<sup>5</sup>*Ibid.*, pp. 3108, 5655.

<sup>6</sup>*Ibid.*, p. 8049.

At this point Congress adjourned. It had been in session during the first six months when a precedent was being set for all future enforcement of the law. Its own attitude had helped to set this precedent. Not once in these first six months had any member of either House proposed to increase the meager appropriation of \$2,000,000 which had been allotted to the Prohibition Bureau for the first half year. Not once had any member of either House discussed on the floor of Congress the question of prohibition on the border or prohibition in the cities or prohibition in the Attorney General's office or prohibition in the courts. Not once had Congress taken any step or shown that it contemplated taking any step which might have convinced skeptical sections of the country from the very start that this law was intended to be taken seriously.

From January to June in 1920 Congress showed less interest in the law than many church societies, many women's clubs, and many Chautauqua circuits, at this time earnestly and in all good faith debating the benefits to be achieved by prohibition, thanks to the foresight of the authors of the Eighteenth Amendment.

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If we follow the work of Congress into a second session the pattern does not greatly change except in one particular. By this time, back in Washington after a summer holiday, Congress had before it certain official summaries of some of the handicaps under which the government had labored.

The Commissioner of Internal Revenue had now filed his first report and pointed out the difficulty of enforcing the law with an inadequate staff of agents. "It was found

impossible to establish a salary scale that would compare favorably with salaries paid in other occupations and which would prove sufficiently attractive to enable the department to secure the number and type of men needed.”<sup>7</sup>

These men were expected to be intelligent enough to understand the law, honest enough to play no favorites in its administration and content enough with the terms of their employment to resist the bribes certain to be offered them by an enormously successful industry. For the purpose of finding such men Congress had appropriated sufficient funds to pay a salary of \$35 a week.

Meantime, appearing before the Appropriations Committee of the House of Representatives in December, 1920, Attorney General Palmer had unbosomed himself of a long list of troubles acquired by his own department in its experiment with enforcement. There had been an alarming increase in federal police activities. In the first eight months of prohibition 17,566 arrests had been made by federal agents. The Attorney General's office was being asked to prosecute cases at the rate of three thousand a month. “It is totally and absolutely impossible to prosecute those cases successfully unless we have more help.” The courts were behind schedule. “The district judges are very restless under this new burden. I am receiving constant complaints from them. . . . The Department of Justice cannot do the work that ought to be done with its present force under the present appropriation.”<sup>8</sup>

<sup>7</sup>*Report of the Commissioner of Internal Revenue*, fiscal year ended June 30, 1920, p. 30.

<sup>8</sup>Associated Press dispatch, Washington, December 29, 1920; *New York World*, December 30, 1920.

Nevertheless, despite this official information, now brought forward to corroborate the obvious evidence of the government's experiences earlier in the year, the second session of Congress passed with as little stir about enforcement as the previous session. The House spent two hours on one occasion debating an increase in the appropriation of the Prohibition Bureau,<sup>9</sup> and fifteen minutes on another occasion debating an increase in the appropriation of the Department of Justice for legal work on prohibition cases.<sup>10</sup> The sums of money at issue in these debates, however, were scarcely important enough to raise large questions of public policy: being \$600,000 in one case and \$200,000 in the other. In the Senate, meantime, not a word was spoken of prohibition during the entire session from first to last, except on January 14th, when Mr. Sheppard called the attention of his colleagues to a telegram which had reached him from Bishop James Cannon, Jr., urging strict enforcement.<sup>11</sup>

The low state of interest of both the Senate and the House in the question of enforcement during this second session may be judged from the record of the bills submitted. For while bills in Congress are often merely verbal broadsides, not necessarily intended to be made into laws, the activity of Congressmen in this respect is usually an accurate index of the relative importance which they attach to various public questions.

In this case, eleven prohibition bills were introduced in the session beginning in December, 1920, and ending in March, 1921—as compared, for example, with eighty-

<sup>9</sup>*Congressional Record*, 66th Congress, 3d Session, pp. 1224-1226, 1229-1233, 1328-1330.

<sup>10</sup>*Ibid.*, pp. 1016-1017.

<sup>11</sup>*Ibid.*, p. 1393.

nine farm bills—and of these eleven only five showed any interest in the problem of enforcement in the United States. The other six soared out of the United States, ignored the problem of enforcement and proposed instead a fresh advance on a broad front west toward Asia.

Three bills demanded the prompt extension of the Volstead Act to the Philippines.<sup>12</sup>

Three others went past the Philippines and proposed to extend the Volstead Act to Americans living in consular districts of China.<sup>13</sup>

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At this point prohibition in the United States was a little more than a year old. The sum of \$4,575,000 had been spent on its enforcement. This sum was demonstrably inadequate. The Prohibition Bureau was still without the staff it needed. The border was unprotected. No police force had been organized on a large enough scale to suppress illicit stills. Not an hour's time had been spent on the floor of either the Senate or the House, discussing the precise responsibility of the states or the question of what the federal government would do in case the states did nothing. The law was being disobeyed in many places. Congress seemed to take small interest.

The question arises, where were the militant prohibition organizations which had played so large a part in the enactment of this legislation? Their authority could not have vanished in a moment. They were too familiar

<sup>12</sup>S. 4550, Mr. Jones of Washington; H. R. 14470, Mr. Randall; H. R. 14478, Mr. Volstead; 66th Congress, 3d Session.

<sup>13</sup>S. 4551, Mr. Jones of Washington; H. R. 14758, Mr. Upshaw; H. R. 14954, Mr. Randall; 66th Congress, 3d Session.

with the history of prohibition legislation not to recognize the importance of a prompt start if Congress really intended to enforce the law. They were too close to the scene of action to believe that in the first year of enforcement Congress had taken its responsibility very seriously. Why had they failed to rouse Congress from its lethargy and stir it into action?

The fact is, that the militant prohibition organizations found themselves in a somewhat equivocal position. They devoutly wished the law to succeed. They were apparently reluctant to bring too much pressure to bear on Congress, in the hope of making it succeed, lest they invite the country to believe that they regarded the first year's experiment as a failure. To ask Congress for drastic action to enforce the law would have been to admit that enforcement required large sums of money. To ask Congress to appropriate these sums of money in the first year of prohibition would all too probably have created fresh opposition to the law precisely at the time when the chief political interest of the country lay in the prompt reduction of its post-war taxes.

Confronted by a choice between arousing Congress and reassuring the country, the prohibition organizations chose the second of these two alternatives. Aside from making a scant five million dollars available for the purposes of the Prohibition Bureau, Congress had done literally nothing at the end of a year to enforce the law. The prohibition organizations chose nevertheless to hail the results achieved by Congress as little short of astonishing. To the Methodist Board of Temperance, Prohibition and Public Morals it seemed at the end of this first year that the law was already being enforced more effectively than many older laws throughout 90

per cent of the country.<sup>14</sup> So well had Congress done its work, in the opinion of the Anti-Saloon League, that in this first twelve months the country had saved "at a conservative estimate . . . more than a billion dollars."<sup>15</sup>

Nor need the country fear that against this saving would be charged higher taxes to cover the cost of enforcement. Mr. Wayne B. Wheeler, who had been ready to predict in 1920 that the law could be enforced at an annual cost of five million dollars, was now ready to predict in 1921 that it could be enforced without any cost whatever. The law would actually pay dividends. "There will be collected in fines, forfeited bonds and prohibitive taxes more than it costs to enforce the law. . . . This appropriation is different from any other appropriation, because it returns to the government more than is paid out for the service."<sup>16</sup>

Plainly Congress had nothing to fear in so mellow a mood on the part of the militant friends of prohibition. During this first year it was occasionally asked to make a small increase in an appropriation bill or to adopt the measures which sought to extend the Volstead Act to China, a proposal which had received the warm endorsement of the Anti-Saloon League.<sup>17</sup> For the rest, it went its way in peace, less bothered by the question of how to enforce the Eighteenth Amendment than it had ever been by the question of whether to enact it.

Not until the second year of prohibition was this serenity interrupted by the appearance of a new problem, suddenly posed before Congress by a totally unex-

<sup>14</sup>*New York Times*, February 13, 1921.

<sup>15</sup>*Ibid.*, January 24, 1921.

<sup>16</sup>Testimony before Senate Committee on Appropriations, *New York Times*, January 29, 1921.

<sup>17</sup>*New York Herald*, December 14, 1920.

pected decision emanating from the Department of Justice.

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This decision was the ruling of Attorney General Palmer, reached at the tag end of the Wilson Administration and announced only after it had taken leave of office, that the Volstead Act placed no limit on the authority of physicians to prescribe beer and wine for medicinal purposes. "I can find in the act no purpose either to directly impose a limitation or to confer upon the executive officer any power to do so," said the Attorney General. "I think, therefore, that a regulation having this in view would be, in effect, an amendment to the statute and not a mere regulation to carry out the expressed purpose of Congress."<sup>18</sup>

As might have been anticipated, the leaders of the prohibition movement lost no time in denouncing this decision as poor law, poor statesmanship, and an unfortunate reversal of policy which was certain to encourage the use of liquor as a beverage on the pretext that it was being used as medicine. Under the auspices of the prohibition organizations meetings were held throughout the country in protest against the ruling made by Mr. Palmer. On behalf of the Anti-Saloon League Mr. Wheeler insisted that neither "the Attorney General nor anyone else is justified in placing such a construction on the wording of the law."<sup>19</sup> In the Senate Mr. Willis of Ohio and in the House Mr. Campbell of Kansas introduced a bill designed to copper-rivet the law against tampering by executive officials.

This measure not only strictly forbade the prescrip-

<sup>18</sup>New York *Times*, March 10, 1921.

<sup>19</sup>New York *World*, March 9, 1921.

tion of beer as a medicine and limited prescription to spirituous and vinous liquors: in addition, it drew up a rigid code of conduct for the medical profession. No physician was to prescribe, nor was any druggist to sell or to furnish on prescription, any wine containing more than 24 per cent of alcohol by volume. No physician was to prescribe, and no druggist was to sell, more than one half pint of alcohol to any one person within a period of ten days. No physician was to receive from the government more than one hundred prescriptions for any period of ninety days, or to issue more than this number unless he could prove "that for some extraordinary reason a larger amount is necessary."<sup>20</sup>

This was the answer of the friends of prohibition to the challenge of Attorney General Palmer. To many spokesmen of the medical profession, unexpectedly caught in the cogs of this dispute, it seemed to go unreasonably far.

Insisting that it was important for physicians to have the "unimpaired right" to prescribe alcohol without Congressional restrictions, the American Therapeutic Society declared that "no legislative body or enforcement authority should limit or hamper a doctor in the legitimate practice or exercise of his functions as a physician."<sup>21</sup> The New York Medical Association protested that there was "nothing inherent in the powers, the traditions or the knowledge of Congress to justify this assumption of suzerainty over the profession of medicine as practised in the United States."<sup>22</sup> In the columns of the *Journal of the American Medical Association* a number of prominent medical men, including

<sup>20</sup>*United States Statutes*, Vol. 42, pt. 1, p. 222.

<sup>21</sup>*New York Times*, June 5, 1921.

<sup>22</sup>*Ibid.*, May 21, 1921.

Dr. Charles L. Dana, Dr. Samuel Lambert, and Dr. Herman M. Biggs, denounced the proposed bill as "an indictment of the integrity of the whole profession, in that it is assumed that many of its members, unless restrained by law, will pander for gain to the people's desire for drink."<sup>23</sup>

Such protests, however, were dismissed by leaders of the prohibition movement as beside the mark. In the opinion of these leaders a larger issue was at stake than the independence of the medical profession. This issue was the sanctity of prohibition. Doctors who opposed this legislation were denounced by the Anti-Saloon League.<sup>24</sup> Congress was advised to ignore their protests.

On June 27 the Willis-Campbell bill was brought before the House, debated for a single day and adopted by a vote of 250 to 93.<sup>25</sup> In the Senate some opposition to the bill developed, but not enough to block its progress. It was adopted by the Senate on August 8th by a vote of 39 to 20;<sup>26</sup> sent to the President on November 19th, after a delay in conference; and signed by him on November 23d.

By contrast with the indifference of Congress in the first year of prohibition, here, in the second year, was action. Yet it is clear that this action, designed to close a gap unexpectedly opened in the Volstead Act, actually resulted in creating a situation more anomalous than ever.

For the great difficulty, to date, had not been a lack of drastic legislation. There was plenty of drastic legislation in the Volstead Act. The obvious failure of Congress had been its failure to make that law effective.

<sup>23</sup>*Journal of the American Medical Association*, June 4, 1921.

<sup>24</sup>*New York Tribune*, April 18, 1921.

<sup>25</sup>*Congressional Record*, 67th Congress, 1st Session, p. 3135.

<sup>26</sup>*Ibid.*, p. 4742.

At the end of a year it was already clear that if Congress wished to put an end to widespread lawlessness it would be wise to give the country either less law or more machinery of enforcement. At this juncture Congress chose to enact more law, rather than less law, and to create no new machinery to enforce it.

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The Willis-Campbell Law, known before its adoption as the Emergency Beer Bill, represents a landmark in the work of Congress because it was the first law, and for some years the only law, enacted by Congress to supplement the Volstead Act. Not until March 26, 1924, when a bill to authorize a temporary increase in the Coast Guard received the approval of both Houses,<sup>27</sup> did Congress adopt another law in any way concerned with prohibition in the United States.

Meantime, one session succeeded another, and the record revealed no sudden change in the interest of Congress in the problem of enforcement. Now and then a flurry of speech-making would sweep the Senate or the House, with a few wets and drys assailing one another for bigotry or treason. Now and then some particularly ambitious plan would be submitted in the form of a bill or resolution: on February 2, 1922, Senator Jones of Washington, reading in the newspapers that Spain had threatened to boycott Iceland because of the adoption of prohibition by that country, introduced a resolution expressing the Senate's attitude toward Spanish-Icelandic relations.<sup>28</sup> Now and then some vigorous partisan of prohibition like Mr. Upshaw of Georgia

<sup>27</sup>H. R. 6815, 68th Congress, 1st Session.

<sup>28</sup>S. Res. 230, 67th Congress, 2d Session.

would rise on the floor of one House or the other, to insist that the law must be enforced regardless of the cost, even if Congress was forced to spend "twenty millions or fifty millions or even a hundred millions a year, until this mighty task is completed."<sup>29</sup>

On all such occasions the House was generous with its applause but by no means prepared to yield uncritically to its own enthusiasm. If it frequently cheered to the echo the proposal to enforce the law fearlessly and to the hilt, "regardless of the cost," on no occasion did it accept this principle as a guide to its own action. Appropriations for the Prohibition Bureau remained at a modest figure, so far below the demonstrated needs of the enforcement service that by the end of the second year of the experiment some of the smaller prohibition organizations, if not the Anti-Saloon League itself, were beginning to be restless.

In November, 1921, the chairman of the Prohibition party complained that the law had been neglected, deplored "the scandalous, ineffective enforcement in many parts of the country" and insisted that the time had come when "the American people must take things into their own hands."<sup>30</sup> The American Lutheran Publicity Bureau gave the press a statement declaring that "the authorities in many places are in collusion with the lawbreakers or helpless against the magnitude of the evil; the situation is fast becoming intolerable."<sup>31</sup> The annual conference of Methodist churches in New York adopted a resolution asking the President to call out the army and the navy to put an end to bootlegging.<sup>32</sup>

<sup>29</sup>*Congressional Record*, 67th Congress, 4th Session, p. 4544.

<sup>30</sup>Associated Press dispatch, Chicago, November 29, 1921.

<sup>31</sup>*New York Times*, January 12, 1922.

<sup>32</sup>*Ibid.*, April 4, 1922.

All told, there was enough dissatisfaction and resentment in the air, as prohibition entered its third year, to convince the loyal but inactive dry majority of Congress that the time had come when it must act again. Accordingly, a new bill was brought before the House in April, 1922. It proposed to attack the problem of enforcement not by arming the officers of the law with larger funds or more authority, but by deporting aliens.

§

This proposal, in the form of a bill to make alien violators of the law liable to deportation for a first offense, was a measure to which most of the prohibition organizations could give their cordial approval, for the reason that it implied no lack of merit in the law itself but fitted in precisely with the theory that opposition to the law was the work of a small company of unpatriotic and disloyal malcontents. In this theory many of the friends of prohibition had put their faith since the start of the experiment, and by 1922 the Anti-Saloon League was prepared to believe that a large part of the difficulty encountered by the law could be attributed to alien influence. "In many places," wrote Mr. Wheeler, in a letter addressed to members of the House, "most of the offenders against the liquor and narcotic laws are aliens."<sup>33</sup>

In the House itself opinion was divided between those who shared this point of view and those who believed that aliens contributed only a small fraction of the number of violations occurring every day. This second group insisted that the right way to enforce the law was to enforce it even-handedly against all violators and declared

<sup>33</sup>*Congressional Record*, 67th Congress, 2d Session, p. 5074.

that the proposal to make alien violators liable to deportation for an act which might involve merely the manufacture of a gallon of home-brewed wine was to create a penalty out of proportion to the character of the offense.

This argument was advanced in the House not only by many opponents of prohibition but by some of its unquestioned friends. Mr. Moore of Virginia warned his dry colleagues that such legislation as this might react against their cause.<sup>34</sup> Mr. Huddleston of Alabama, describing himself as a lifelong prohibitionist, insisted that the proposal to punish alien violators first "by fine and imprisonment in this country and then by banishment to some foreign land from which perhaps the alien fled to save his life . . . marks the high tide of fanaticism and intolerance."<sup>35</sup>

Such protests as these, however, stimulated friends of the bill to redouble their efforts in its behalf. Mr. Cramton of Michigan told the House that aliens who were unwilling "to support the supreme law of the land, the codification of our American spirit," deserved small consideration at the hands of Congress: "for God's sake send them back where they came from."<sup>36</sup> Mr. Roach of Missouri replied to those critics of the bill who had described it as too drastic: "I want to answer that," said Mr. Roach, "by saying that in our attempt to support the Constitution of the United States and enforce it, we are not going to write a law that is too drastic for that purpose. That is exactly the trouble now, that the laws by which the Eighteenth Amendment is to be enforced are not sufficiently drastic."<sup>37</sup>

<sup>34</sup>*Congressional Record*, 67th Congress, 2d Session, p. 5079.

<sup>35</sup>*Ibid.*, p. 5071.

<sup>36</sup>*Ibid.*, p. 5075.

<sup>37</sup>*Ibid.*, p. 5081.

Here, certainly, was a familiar theme: the theme that what the situation needed was not a vigorous effort to enforce existing law, an effort which required thought and money, but a fresh supply of drastic legislation, which was cheap.

By a vote of 222 to 73 the House adopted the bill for deportation and sent it to the Senate.<sup>38</sup>

In this same year the Prohibition Bureau continued to roll its heavy stone uphill, its budget having been increased over its budget for the previous year merely by a nominal \$400,000.<sup>39</sup>

§

The Senate having shown no interest during 1922 in the plan of the House to deport aliens, and criticism of Congress on the score of its inaction having mounted, meantime, rather than diminished, the House looked elsewhere at the start of the fourth year of prohibition for an opportunity to contribute something to the enforcement of the law. Once more it overlooked the possibility of bringing its appropriations into line with the actual needs of the Prohibition Bureau, of placing enough guards along the border to put an end to rum-running or of giving the government the legal authority and the staff of agents it needed in order to prevent the diversion of industrial alcohol. Instead, having debated the question of aliens in 1922, the House now turned its attention in the direction of the diplomatic corps.

The issue arose early in the year when Mr. Cramton of Michigan, who had been active in support of the

<sup>38</sup>*Congressional Record*, 67th Congress, 2d Session, p. 5083.

<sup>39</sup>The sums of money appropriated annually by Congress for the enforcement of prohibition will be found in Appendix F.

deportation bill, introduced a resolution calling on the Secretary of the Treasury to reveal what shipments of intoxicating liquors had been received by the embassies and legations in Washington since January, 1920, "giving in connection with each such shipment the name and office of each consignee, the country to which he was accredited, the kind and quantity of liquor, the place from which shipped to the United States, to whom delivered by the Customs Service, and the date of such delivery to the consignee or his representative."<sup>40</sup>

The question at issue, Mr. Cramton insisted, was by no means trivial. Charges had been made that diplomatic liquor was pouring into the hands of bootleggers. In Washington "the problem of enforcement of the Eighteenth Amendment is said to be acutely affected by the presence of these liquors." The question was a serious one. "It is time Congress and the country knew the facts about this, knew whether that which has been permitted as a courtesy is being used as a cover for abuses seriously contributing to scandalous disregard of the fundamental law of our land."<sup>41</sup>

Introduced in the House on February 3d, Mr. Cramton's resolution brought a reply from the Secretary of the Treasury on February 13th. It was a well established principle, this official pointed out, "that diplomatic representatives of foreign governments are entitled to free entry of goods as a matter of international comity and usage. . . . The Treasury does not, of course, endeavor to exercise control over the disposition of intoxicating liquors delivered to diplomatic representatives, and it is manifest that it could not do so without infringing their diplomatic privileges and immunities.

<sup>40</sup>H. Res. 503, 67th Congress, 4th Session.

<sup>41</sup>*Congressional Record*, 67th Congress, 4th Session, p. 3789.

Nor could it properly give out any reports or other information as to importations of intoxicating liquors by diplomatic representatives, in view of their diplomatic status and the protection of person and property to which that entitles them.”<sup>42</sup>

This statement from the Treasury was by no means satisfactory to Mr. Cramton. The liquor record of the embassies, he insisted, was a matter of importance to the country. This record was available at the Treasury. “It ought to be furnished to the Congress, the body which has the responsibility of dealing with the question.” Mr. Cramton therefore insisted that the House adopt his resolution and call on the Treasury to divulge its facts.<sup>43</sup>

Opposition to this plan came from certain members who were not convinced that it was wise. Mr. Parker of New Jersey described the proposed resolution as unfair to the embassies, and Mr. Garrett of Tennessee insisted that the only result of it would be to promote “friction and trouble and irritation on the part of foreign countries.”<sup>44</sup> The House, however, was plainly in a mood for action. A good deal of time had elapsed since the adoption of the alien deportation bill, and nothing had happened in the meantime to convince the more restless friends of prohibition that Congress was sternly resolved to enforce the law.

By a vote of 189 to 113 the House adopted Mr. Cramton’s resolution and sent it to the Treasury, where it came to rest. For since the Secretary of the Treasury was required to divulge only such information as was

<sup>42</sup>*Congressional Record*, 67th Congress, 4th Session, pp. 3790–3791.

<sup>43</sup>*Ibid.*, p. 3791.

<sup>44</sup>*Ibid.*, pp. 3792–3793.

not incompatible with the public interest, and since he had already expressed his opinion that it would be incompatible with public interest to divulge this particular information, there was nothing more to be done about it. Here the matter ended.

This was the sole contribution made by Congress to the cause of prohibition during the year 1923. No other bill was adopted either in the Senate or the House. No other bill was seriously discussed. Only one other bill was referred to even casually on the floor of either House. This bill was Senator Sterling's measure to place the employees of the Prohibition Bureau under civil service regulations.

The history of this legislation throws an instructive light from another angle on the attitude of Congress toward the experiment with prohibition.

§

When the Volstead Act was adopted in 1919, Congress, for reasons of its own, had chosen to leave the appointment of all field agents in the hands of the Commissioner of Internal Revenue, without regard to the civil service rules applying to most other federal positions.

This action had been vigorously opposed at the time by the National Civil Service Reform League, which filed its protest with the conference committee of both Houses.<sup>45</sup> Later on, the Anti-Saloon League, which had written at least as much of the Volstead Act as Mr. Volstead, agreed that the provision exempting prohibition agents from civil service rules was an unfortunate

<sup>45</sup>New York Times, September 14, 1919.

provision, but insisted that it would have been impossible to write the law in any other way.

"When the Volstead Act was passed," said the secretary of the League, "neither the Anti-Saloon League nor any other agency could have gotten into that law a civil service provision, and for the League to have forced the issue would have been to jeopardize the passage of the bill."<sup>46</sup> To this the vice-president of the National Civil Service Reform League replied: "The plain fact is that the Congressmen wanted the plunder and you let them have it. . . . You admit that the League, although knowing the Congressmen's views were wrong, yielded to them to get the bill passed. That means that you bought the bill with Congressional patronage and paid for it not with your own money but, far worse, with offices paid out of taxes levied upon the people."<sup>47</sup>

This was the status which a long-continuing controversy had reached by 1923, but well before this time the disadvantages of a political system of appointments had seemed to many friends of the law to be a heavy handicap to its enforcement. As early as the first year of prohibition, a bill to place the staff of agents under civil service regulations was introduced in the Senate by Mr. Sterling of South Dakota, and a similar bill was presented in the House by Mr. Tinkham of Massachusetts, not as a partisan of prohibition, but as a champion of the civil service.<sup>48</sup>

These bills were ignored by Congress during 1921. They were reintroduced in 1922. They were again ignored by Congress. Four sessions had passed without

<sup>46</sup>New York Times, January 8, 1923.

<sup>47</sup>Congressional Record, 67th Congress, 4th Session, pp. 4532-4533.

<sup>48</sup>S. 4734, H. R. 15228, 66th Congress, 3d Session.

so much as a favorable report from a committee of either House, when Mr. Tinkham, apparently losing hope of any action by this method, attempted in December, 1922, to offer his bill as an amendment to a measure carrying appropriations for the Prohibition Bureau. This proposal was defeated by a vote of 56 to 7—a majority of eight to one.<sup>49</sup> In 1923 both Mr. Tinkham's bill and Mr. Sterling's bill were still alive, having carried over from the previous session. At the end of the year, however, both bills were still locked in the files of the same committees which had ignored them for four years.

The fact is that members of Congress, endowed by the Volstead Act with a particularly attractive form of patronage, were extremely reluctant to surrender a privilege which had been one of the happy by-products of their foresight in adopting national prohibition. So well established was the system of political control by the end of the first few years of prohibition that even the Anti-Saloon League found itself embarrassed by the prerogatives claimed by Congress.

On February 10, 1923, Mr. Richard H. Dana, secretary of the National Civil Service Reform League, forwarded a letter to President Harding in which he said: "Mr. Wayne B. Wheeler has recently twice told us that when both he and the Prohibition Commissioner had decided on and made a removal [of some agent], up would turn a member of Congress who was responsible for the appointment and insist that the man be reinstated." Mr. Wheeler was not officially part of the government's enforcement service, but both he and the Prohibition Commissioner had been forced "to yield

<sup>49</sup>*Congressional Record*, 67th Congress, 4th Session, pp. 223-224.

against their better judgment, time and time again."<sup>50</sup>

This was February, 1923. One year after this letter was written, the bills which proposed to take enforcement out of the hands of the politicians were still reposing quietly in the files of two committees, while prohibition celebrated its fourth birthday.

§

If a tourist in Washington had gone to the Capitol in the early days of 1924, led there by his interest in this fourth anniversary of a national crusade, he might have been fortunate enough to hear a ringing demand for law enforcement made on the floor of the Senate or the House. If he had visited the office buildings which flank the Capitol on either side, he would unquestionably have been told by at least two of every three Congressmen with whom he talked that prohibition was the law of the land, that it represented the settled convictions of the American people, and that Congress was resolved to leave no stone unturned in its effort to enforce the law.

All this, if the tourist were a friend of prohibition, would have been immensely cheering. If he had gone to the House or the Senate Document Room, however, to discover precisely how many stones Congress had upturned, in its interest in enforcement, he would have been told that only one bill bearing in any way on the question of prohibition in the United States had been made a law in the first four years of this experiment: the Willis-Campbell bill to prevent doctors from prescribing beer.

If he had gone to the Prohibition Bureau to discover how much money Congress in its solicitude for the law

<sup>50</sup>New York *Times*, March 6, 1923.

had appropriated for its enforcement, he would have been told that appropriations for these four years had averaged \$6,981,250 a year. If he had gone to the Congressional Library to discover how much interest Congress had shown in such problems as the prosecution of prohibition cases in the courts, the reorganization of the government enforcement service, the regulation of industrial alcohol, the prevention of illicit distilling and the division of authority between Washington and the states, he might have studied the pages of the *Congressional Record* for a year without finding any evidence of a serious discussion of such questions.

So completely did Congress avoid these larger problems of enforcement during the first four years of prohibition that even an amateur investigator with an hour to spare in the Congressional Library would have been tempted to suspect that the design was scarcely accidental. As a matter of fact, this avoidance of the larger problems of enforcement was the deliberate policy of Congress, undertaken with the approval of its most important prohibition leaders. These leaders had always advised Congress to adopt a policy of caution. They had favored the omission of any reference to "use" or "purchase" in the Eighteenth Amendment. They had willingly accepted Mr. Wheeler's estimate of five million dollars as ample for enforcement. They had advised a policy of caution in appropriations in the first years of the law. They still advised a policy of caution in the early months of 1924.

When a proposal was made, precisely at this time, for a sweeping investigation into every phase of the problem of enforcement, it was the dry leaders in Congress who discouraged the idea that such an investigation could possibly be useful. "In view of the marvelous

achievements of the prohibition enforcement unit," said Senator Sheppard, author of the Eighteenth Amendment, "a general investigation would be worse than useless—a waste of funds and energy and time. Instead of a resolution of investigation, the unit should have a vote of thanks."<sup>51</sup>

Other leading prohibitionists in Congress echoed this opinion. "The fact is," said Senator Willis of Ohio, "that the effect of the inquiry proposed . . . is exactly the thing which every person in this country who is opposed to the Eighteenth Amendment and to its observance and enforcement would desire. What could better operate to paralyze the forces of law enforcement than such an inquiry as is here proposed?"<sup>52</sup>

At first thought, this would seem to be a curious argument to be made by friends of prohibition: the argument that it would paralyze enforcement to find out what was wrong with it. In reality, however, this was strategically a sound position for the friends of the law to take. A searching investigation into the record of enforcement would have produced evidence to show that in certain respects enforcement was casual and superficial, a matter of pretense rather than of fact. Such evidence might have injured the prestige of the law itself. It would have armed critics of the law with a new weapon. It would have challenged Congress to accept the logic of its own position and in the face of a considerable body of hostile opinion to embark upon an uncompromising program of enforcement, whatever its cost and whatever risks it might involve.

Far safer than a leap into the dark like this was the policy which Congress had pursued to date: a cautious

<sup>51</sup>*Congressional Record*, 68th Congress, 1st Session, p. 3237.

<sup>52</sup>*Ibid.*, p. 3234.

policy of skirting the real problems of enforcement and saving its thunder for the aliens and the diplomats, of calling for strict enforcement and meantime economizing on appropriations which might have been unwelcome to the public, of blaming the states for their failure to take aggressive action and meantime setting the states a perfect example of inaction.

It seems clear, in fact, that Congress had worked out for itself by 1924 a position with which it was well satisfied. It was, on the whole, a comfortable position, far more satisfactory to the average member of the majority than his position had ever been in the anxious days before the Eighteenth Amendment, when Congress was badgered by both wets and drys.

The wets were out of the running now, confronted by the apparent impossibility of modification or repeal. The drys might file an anxious protest now and then, but they were effectively estopped from any real rebellion by their desire to pronounce the law an unqualified success. Meantime, Congress itself had abundant freedom from all worry, a new type of patronage with which to build up political machines at home and plenty of opportunity to make speeches about patriotism, good citizenship and unswerving loyalty to the Constitution.

This was more than a comfortable position. It was very near ideal.

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## CHAPTER V

### The Search for a Formula

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WHILE the law limped on, no President challenged Congress to accept responsibility for its own legislation. No President pointed out the difficulty of attempting to enforce the law with an inadequate staff of agents. No President volunteered to lead a crusade in behalf of larger appropriations.

Whether the duty of initiating such a crusade properly rested on the President is an open question. The President was not a supreme prohibition agent. He had many laws to enforce, many policies to frame, and many bureaus to remember. It is possible that if he had set himself at the task of persuading Congress to appropriate enough funds for a serious experiment with the enforcement of prohibition, he would have had no time for any other public business. It is also possible that if he had succeeded in this effort he would have capsized his own budget.

Without leading a crusade, however, the President might have pointed out to Congress the anomaly of his position. He was sworn to enforce the law. He could not enforce the law with the equipment at his command. By the end of the first four years of prohibition the responsibilities of the executive department had enormously expanded; its personnel remained unequal to the

work which it was called upon to handle. With 3,374 employees on the pay roll of the Prohibition Bureau in 1924, it was theoretically the duty of the government to prosecute 40,000 prohibition cases in the federal courts, to guard 18,000 miles of seacoast and of border, to safeguard against diversion 57,000,000 gallons of industrial alcohol and, with what help it could obtain from the states and municipalities, to prevent the manufacture of intoxicating liquor in the kitchens or the basements of 20,000,000 homes.

In these circumstances it would have been logical for any President in the early years of prohibition to confront Congress with an ultimatum, insisting either that enough funds be made available for an honest effort to administer the law or that Congress clear the executive department of responsibility for its enforcement.

§

In the collected papers of the Presidents of the United States the problem of enforcement is discussed from various points of view, during the first four years of prohibition, but with no suggestion of an ultimatum.

In an address at Marion, Ohio, on July 4, 1922, Mr. Harding insisted that obedience to the law was a duty of good citizenship: "The Eighteenth Amendment denies to a minority a fancied sense of personal liberty, but the Amendment is the will of America and must be sustained by the government and public opinion."<sup>1</sup>

In December of the same year, in his message to Congress, Mr. Harding repeated his conviction that prohibi-

<sup>1</sup>New York *Times*, July 5, 1922.

tion represented the will of the American people and his insistence that the law must be enforced, but suggested that "in plain speaking there are conditions relating to its enforcement which savor of nation-wide scandal." Mr. Harding suggested two ways of improving these conditions. He urged a wider respect for the law on the part of private citizens. He also urged a larger contribution to enforcement by the states and announced that with this end in view he "purposed to invite the Governors of the states and territories, at an early opportunity, to a conference with the federal executive authority."<sup>2</sup>

In May of the following year, at a time when the Legislature of New York had repealed its state enforcement law and the repeal bill was awaiting the veto or approval of the Governor, Mr. Harding insisted that "the executives of the nation and equally the executives of the states are sworn to enforce the Constitution." The Eighteenth Amendment had placed a joint responsibility upon both the federal and state governments. "It will be obvious that many complex and extremely difficult situations must arise if any of the states shall decline to assume their part of the responsibility of maintaining the Constitution and the laws enacted in pursuance of it."<sup>3</sup>

In June of this same year, in an address at Denver during his last trip West, Mr. Harding again returned to the question of state responsibility and the duty of the individual citizen. Reports to the federal government indicated "a growing laxity on the part of state authorities about enforcing the law," the President declared. "Doubtless this is due to a misconceived notion,

<sup>2</sup>Message to Congress, December 8, 1922.

<sup>3</sup>New York Times, May 17, 1923.

too widely entertained, that the federal government has actually taken over the real responsibility." As for the responsibility of the individual citizen: "The example of law defiance by those who can afford to buy and are reckless enough to take the risk . . . may some day find expression in far more serious form. I do not see how any citizen who cherishes the protection of law in organized society may feel himself secure when he himself is the example of contempt for law."<sup>4</sup>

This was Mr. Harding's last comment on prohibition. It was followed, a little later, by an address delivered by Mr. Coolidge before the Governors' conference which Mr. Harding had proposed in December, 1922, and which now assembled in October, 1923. Mr. Coolidge urged that the Governors take home with them a message to their legislatures that "neither the Eighteenth Amendment nor the Prohibition Act undertakes to relieve the states of their responsibility relative to intoxicating liquors." He discussed the responsibility of the individual citizen. "The complementary duty to enforcement of the law is obedience to the law." He defined for the assembled Governors the central problem of enforcement. "The main problem arises from those who are bent on making money by an illegal traffic in intoxicating liquors. If this could be eliminated, the rest would be easy."<sup>5</sup>

A few weeks later, in his message to Congress in December, 1923, Mr. Coolidge repeated his plea to the private citizen to obey the law, again urged the importance of a substantial contribution by the states, suggested as the contribution of the federal government "a supply of swift power boats" and the strengthening of

<sup>4</sup>New York *Times*, June 26, 1923.

<sup>5</sup>Ibid., October 21, 1923.

the Coast Guard and declared that "the major sources of production should be rigidly regulated."<sup>6</sup>

The Prohibition Bureau, charged with responsibility for regulating the major sources of production, was at this time operating on an appropriation of \$8,250,000. It had had \$8,500,000 for the previous year, but in the interest of post-war economy its appropriation had been reduced in the budget submitted to Congress by the executive department.<sup>7</sup>

§

In the messages and public statements in which two Presidents discussed the problem of enforcement in the first four years of prohibition there was much comment on the duties of the states, some comment on the duties of the federal government, and an earnest exhortation to the public to obey the law rather than to treat it with indifference. In these statements and messages, however, there was no attempt on the part of the President to hold Congress responsible for setting both the public and the states an example of the indifference which the President deplored. There was no attempt to discuss the problem of enforcement in relation to the machinery of enforcement which Congress had provided, or to dissociate the executive department from responsibility for inadequate appropriations.

As a matter of fact, the executive department was in no position to dissociate itself from responsibility in the matter of appropriations. For the estimates submitted to Congress by successive Presidents for enforcement in

<sup>6</sup>Message to Congress, December 6, 1923.

<sup>7</sup>*Estimate of Appropriations for the Fiscal Year Ended June 30, 1924*, p. 669.

the early years of prohibition were as meager as the funds actually allotted for the law by Congress.

For 1921, the first full year of prohibition, the executive department submitted to Congress an estimate of \$4,000,000.<sup>8</sup> This was a full million dollars below Mr. Wheeler's estimate and too small a sum for Congress. Congress appropriated \$4,750,000 at the start of the year and added \$1,600,000 later.

For the next four years the President's estimates were \$6,750,000, \$9,250,000, \$8,250,000 and \$9,379,770 respectively;<sup>9</sup> the appropriations of Congress for these same years were \$6,750,000, \$8,500,000, \$8,250,000, and \$10,012,330.<sup>10</sup>

At the end of five years the President had recommended an average expenditure of \$7,525,954. Congress had actually appropriated \$7,972,466. By a slight margin, Congress had voted more funds for enforcement than the President had requested in his budgets.

Meantime the White House, whoever its occupant, made it a settled policy to remain aloof from such questions, closely allied with appropriations, as the reorganization of the prohibition service in the interest of obtaining better results from any funds, however modest, which were voted for enforcement.

In December, 1922, after five sessions of Congress had failed to result in any action on the proposal to bring the Prohibition Bureau under civil service regulations, the National Civil Service Reform League came to President Harding with a request that he issue an

<sup>8</sup>*Estimate of Appropriations for the Fiscal Year Ended June 30, 1921*, p. 63.

<sup>9</sup>*Estimate of Appropriations for the Fiscal Years Ended June 30, 1922, 1923, 1924, 1925*, pp. 70, 59, 669, 686.

<sup>10</sup>Cf. Appendix F.

executive order placing agents of the Bureau in the classified service.

The President had ample power to issue such an order. His decree would have been as effective as action taken by Congress itself, except for the possibility that some later President might have issued a contrary order restoring the spoils system in the appointment of enforcement agents. Mr. Harding, however, declined to interfere. "I am not yet convinced," he informed the National Civil Service Reform League, "that this is the wisest step to take to promote effective service."<sup>11</sup> Mr. Coolidge likewise declined to interfere, suggesting the danger that some later President might upset his order if he issued it.<sup>12</sup>

Similar reluctance on the part of the executive department to intervene in the plans of Congress appeared in the case of a proposal to transfer the Prohibition Bureau from the Treasury Department to the Department of Justice. There had always been a considerable body of expert opinion in favor of this change—ultimately to be recommended, in 1930, by the Wickersham commission. Even before the Volstead Act was adopted, Mr. Carter Glass, as Secretary of the Treasury, had sent a letter to the Judiciary Committee of the House of Representatives, urging that the new bureau be set up in the Department of Justice rather than in his own department, since "the enforcement of prohibitory laws is in no way a fiscal matter," but "depends for its effectiveness principally on the steps which will be taken in the courts throughout the country by the Department of Justice."<sup>13</sup>

<sup>11</sup>New York *Times*, March 7, 1923.

<sup>12</sup>Message to Congress, December 3, 1924.

<sup>13</sup>New York *Times*, June 21, 1919.

Congress had chosen to ignore this advice, but certain observers in an excellent position to watch the operation of the law had continued to insist that the change in departments was a matter of importance. Mr. Glass's opinion on this point was reaffirmed by his successor, Secretary Houston, who declared that the Treasury should be given "the opportunity of centering its attention upon its primary functions and should not be encumbered with large activities unrelated to fiscal operations." The senior circuit judges of the country, basing their recommendations on abundant first-hand experience in the courts, urged that the change be made without delay, as much in the interest of the prohibition law as of the Treasury Department. In a formal statement in which Chief Justice Taft concurred, they insisted that it "would make much for effectiveness in enforcing the law" if "all the appropriations for enforcement should be expended under the direction of the Attorney General."<sup>14</sup>

Nevertheless, despite the interest shown in this proposal by two Secretaries of the Treasury, the senior circuit judges and the Chief Justice of the United States, neither Mr. Harding nor Mr. Coolidge raised the question of this possible transfer in any of their public statements on the problem of enforcement, discussed its relative advantages and disadvantages in any of their messages to Congress, or expressed an opinion in these messages on the merits of any one of several bills introduced in the Senate and the House, designed to effect a change in the status of the Prohibition Bureau on the initiative of Congress.

Lack of interest in such plans need not suggest that either Mr. Harding or Mr. Coolidge lacked interest in

<sup>14</sup>Associated Press dispatch, Washington, November 26, 1924.

the question of enforcement. As Presidents, they could not possibly lack interest in this question. As Presidents, charged theoretically with enforcement of many thousand federal laws, they could not possibly fail to note with interest that one federal law now resulted in an incomparably larger number of prosecutions in the courts than any other federal law.<sup>15</sup> No doubt both Presidents felt a genuine concern over the readily available evidence of disrespect for a law which had the sanction of the Constitution. Mr. Harding warned the country on one occasion that violations of the Prohibition Act "bred a contempt for law" which might "ultimately destroy the Republic."<sup>16</sup> Mr. Coolidge declared in his address to the Governors' Conference in 1923 that in the ability of the nation to enforce its laws "is revealed the life or the death of the American ideal of self-government."<sup>17</sup>

The fact remains, however, that while both Mr. Harding and Mr. Coolidge were willing to discuss enforcement in its broadest terms, as a matter of public policy, good government and sound theory, they were not prepared either to urge Congress to increase its appropriations for the enforcement of a law which was being widely violated or to interfere definitely enough in any controversial question of enforcement to take away from Congress full responsibility for establishing the major principles of a policy of national prohibition.

Through these early years from 1920 to 1924 the executive branch of the government was apparently content to stand on the theory that since the legislative branch had chosen to originate the experiment with na-

<sup>15</sup> *Report of the Attorney General of the United States*, fiscal year ended June 30, 1925, pp. 134, 135, 138.

<sup>16</sup> Message to Congress, December 8, 1922.

<sup>17</sup> *New York Times*, October 21, 1923.

tional prohibition on its own initiative, it was plainly the duty of the legislative branch, and not of the executive branch, to carry the experiment successfully to its conclusion.

This policy was entirely satisfactory to Congress.

§

For a hard-pressed Prohibition Bureau which could feed, meantime, neither on the inexpensive oratory of Congress nor on the exhortations addressed by successive Presidents to the public, the early years of this adventure were not easy ones. The Prohibition Bureau could not ignore the concrete problems of enforcement which Presidents had left to Congress and Congress had set aside in order to devote its time and energy to aliens and the diplomatic corps. The Prohibition Bureau was forced to attack these problems as best it could, with a staff which had an average of 3,060 agents for the years from 1920 to 1925, including clerks and stenographers as well as active agents in the field.<sup>18</sup>

Obviously with such a staff the activities of the Prohibition Bureau were strictly circumscribed. There were certain things which it could do. There were other things which lay beyond its power to accomplish. It is possible to define the authority of the Bureau with some precision by the end of 1925. For at this juncture in the experiment with the Eighteenth Amendment and the Volstead Act, a subcommittee of the Senate Committee on the Judiciary initiated a series of hearings which, while not intended to explore the whole problem of en-

<sup>18</sup>*Report of the Commissioner of Internal Revenue, fiscal years ended June 30, 1920, 1921, 1922, 1923, 1924, 1925.*

forcement, brought to the witness stand the chief enforcement officers of the government, including General Lincoln C. Andrews, at this time Assistant Secretary of the Treasury, in charge of prohibition work, and Dr. James M. Doran, chief of the Chemical Division of the Prohibition Bureau.

The testimony of these witnesses supplies an accurate index of the ability of the government to deal in 1925 with the five chief sources of illegal liquor which had constituted its chief problem from the outset.

§

As early as January, 1920, the Prohibition Bureau had drawn up regulations to control the first potential source of supply which threatened to become a problem: the prescription of alcohol by doctors and the sale of alcohol by druggists. These regulations were accompanied by a permit system. The Bureau also required records to be kept of the character of the illnesses of millions of sick people throughout the country, the amount of alcohol prescribed for them following a diagnosis by their doctors and the precise form in which this alcohol was given.

During the first six years of enforcement the Bureau issued an average of 63,891 permits annually to doctors. It revoked an average of 169 permits. It issued various instructions concerning the use of whisky as first-aid and raided various drugstores. It was obvious, however, that if the Bureau were to hunt in the haystack of 11,000,000 prescriptions issued every year for cases which seemed to be suspicious, and to subject these cases to first-hand examination, it needed a large staff of agents. If it

hoped to prevent the cutting of whisky in drug stores, a practice not appearing in the records, it needed still more agents.

These agents it did not have. At the hearings of the Senate subcommittee it was testified that by the end of 1925 the government had only 17 inspectors to keep check upon 1,200 drugstores and to investigate approximately a million prescriptions issued every year by 5,100 doctors in New York City.<sup>19</sup> It was testified by the Assistant Secretary of the Treasury that in New York and in other large cities the control of medicinal liquor was inadequate and its misuse extensive.

"I am working now on the details of a law which I shall ask Congress to consider," said General Andrews, "which will enable me to control the distribution of medicinal whisky, which I cannot do now."<sup>20</sup>

## §

The second source of supply presenting a problem for the Prohibition Bureau was the brewery manufacturing illegal beer. The problem here was similar to the problem of preventing the misuse of medicinal liquor, since it imposed upon the Prohibition Bureau an effort to enforce regulations with a staff of agents which the Bureau did not have.

In this case the regulations were concerned with the methods by which near-beer was to be produced and the methods by which it was to be kept within the strict limitations of the Volstead Act. The production of near-beer was small by comparison with the produc-

<sup>19</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 119-121.*

<sup>20</sup>*Ibid.*, pp. 70-71.

tion of real beer before the adoption of the Eighteenth Amendment. Nevertheless, 956,220,919 gallons of near-beer were produced during the first five years of prohibition.<sup>21</sup> All of this near-beer had first been manufactured as genuine beer with a higher alcoholic content. The problem of the Prohibition Bureau had been to see that all of it had been legally de-alcoholized. It was apparent in the circumstances that the government lacked agents for this work. "There is every reason to believe," said Mr. Wayne B. Wheeler at this time, "that in several hundred plants large amounts of high-powered beer are made and distributed to the bootleg trade."<sup>22</sup>

So far from satisfactory was the situation at the end of 1925 that General Andrews appealed to the Senate subcommittee to enlarge his staff of agents and to enact new legislation which would enable him both "to keep high-test beer off the market" and "to protect the honest brewer."<sup>23</sup> With this end in view he urged an amendment of the Volstead Act giving the government power to apply for an injunction against any brewery violating the rules of the Prohibition Bureau and additional power to place brewery apparatus under lock and key when it was not in use.<sup>24</sup>

§

The third source of supply of the bootlegger was liquor smuggled along the seacoasts and across the

<sup>21</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 52.

<sup>22</sup>*New York Times*, April 4, 1926.

<sup>23</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 69.

<sup>24</sup>*Ibid.*, p. 7.

borders. Until 1924 the Prohibition Bureau received only a limited amount of assistance from the Coast Guard. In 1924, however, Congress reorganized the Coast Guard, permitting a temporary increase in its personnel and transferring to its control twenty second-class destroyers to be reconditioned at a cost of \$13,000,000.<sup>25</sup>

This fleet was intended to make war upon Rum Row. To aid it in this effort the State Department had undertaken to negotiate treaties which would broaden the authority of Coast Guard vessels to search suspected ships at sea. Such efforts as this took time. It was in July, 1922, that the American government first broached the question of a treaty with Great Britain,<sup>26</sup> and not until May 22, 1924, that a treaty setting a new search limit at "an hour's steaming distance" from the sea-coast was accepted by both parties, signed, sealed, ratified by the Senate and formally proclaimed. Other treaties were negotiated by the end of 1924 with the governments of France, Germany, Italy, Sweden, Norway, Denmark, Panama, and Holland.

Meantime, to prevent smuggling of liquor across the inland borders, the Prohibition Bureau had in the early years of its enforcement work a staff of 35 men to post along a Mexican frontier 1,744 miles in length (and to cover the states of Texas, New Mexico, and Arizona, incidentally)<sup>27</sup> and a larger and more variable staff for the Canadian frontier. It also had assistance from Customs Service agents not otherwise engaged, from Coast Guard vessels operating in the Great Lakes and from a convention signed with the government of Can-

<sup>25</sup>H. R. 6815, 68th Congress, 1st Session.

<sup>26</sup>New York *Times*, July 25, 1922.

<sup>27</sup>Prohibition Commissioner Kramer, New York *Times*, April 27, 1921.

ada providing for the notification of American officials when any vessel cleared from a Canadian port with a cargo of liquor known to be, or suspected to be, intended for shipment to the United States.

The coöperation of the Coast Guard and the various treaties negotiated by the government were unquestionably of assistance to the Prohibition Bureau in the prevention of rum-running. They were not a satisfactory substitute, however, for a force of agents adequate to maintain an effective watch over a long seacoast and border. In 1923 the Department of Commerce under Mr. Hoover estimated that the value of liquor smuggled into the United States amounted to \$20,000,000 in 1922.<sup>28</sup> For 1923 it increased its estimate to \$30,000,000, and for 1924 to \$40,000,000, with the comment that "in the opinion of officials connected with the Customs Service this is a low estimate."<sup>29</sup>

Asked at the hearings of the Senate subcommittee to estimate what proportion of liquor smuggled into the United States had actually been caught by the end of 1925, General Andrews suggested five per cent.<sup>30</sup>

## §

The fourth problem of the Prohibition Bureau was industrial alcohol. Year by year the production of this type of alcohol had been increasing at a rapidly accelerating rate, either as the result of the expansion of the chemical industry or the expansion of the bootlegging

<sup>28</sup>*New York Times*, September 17, 1923.

<sup>29</sup>*The Balance of International Payments of the United States in 1924*, Department of Commerce, April, 1925.

<sup>30</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, pp. 91-92.

industry or very probably of both. In 1920, the first year of prohibition, 28,000,000 gallons of industrial alcohol were manufactured in the United States.<sup>31</sup> By 1923, the fourth year of prohibition, the production of industrial alcohol had more than doubled. In 1924 it increased to 67,000,000 gallons; and in 1925 it reached 81,000,000 gallons, an increase in six years of 189 per cent.

In an effort to prevent diversion, the Prohibition Bureau established various formulas designed to make this alcohol undrinkable. By 1923 it had created 76 such formulas, varying with the purpose to which the alcohol was intended to be put. Some of these formulas used comparatively harmless denaturants such as oil of peppermint and menthol crystals or lavender and soft soap. Others used poisons as violent as iodine, benzine, and sulphuric acid.<sup>32</sup> On the chance, however, that not even iodine, benzine, and sulphuric acid would carry industrial alcohol through to a wholly legal end, the Prohibition Bureau elaborated the permit system in vogue before the adoption of the Eighteenth Amendment, requiring applicants for the use of alcohol to give some evidence of the legality of their intentions and to post a bond to be forfeited in case of misbehavior.

The system itself was logical, but from the outset it encountered difficulties. In the first place, the law gave the Prohibition Bureau no power to trace industrial alcohol down the line of its widely varied uses beyond the first purchase of alcoholic products manufactured by firms or individuals holding permits.

<sup>31</sup>The figures cited here are quoted from *Industrial Alcohol*, United States Treasury Department, 1930, p. 48.

<sup>32</sup>Prohibition Commissioner Haynes, *New York Times*, July 27, 1923.

In the second place, even if the Bureau had had this power, it lacked the staff of agents required to follow 60,000,000 gallons or 80,000,000 gallons of alcohol through the ramification of many purchases and repurchases, from the time it left the thirty denaturing plants which manufactured it until it reached the ultimate consumer.

In the third place, when the Bureau discovered cases of diversion, it was compelled to initiate elaborate investigations in order to obtain evidence to justify revocation of a permit. As the Bureau itself pointed out: "Mere suspicion that a permittee is not keeping faith with the government is not sufficient under the law to warrant revocation. The law gives permit holders certain legal rights and the burden of proof is upon the government in instances of alleged diversion of alcohol or for other flagrant permit abuses."<sup>33</sup>

In these circumstances, it is evident that an elaborate code of 76 denaturing formulas and an equally elaborate code of rules and regulations governing permits merely drew up a plan for an effort to enforce the law and did not actually constitute enforcement in themselves. Formulas were useful: they handicapped bootleggers at least to the extent of compelling them to "wash" industrial alcohol before turning it into expensive liquors for a public ready to pay fancy prices. Rules and regulations sketched the outline of a system of control which was founded on valuable experience. These rules, however, were not self-executing. They required the application of constant pressure at many different points.

Proof of this fact is to be found in the actual results of the effort to prevent diversion. Testifying before

<sup>33</sup>*Industrial Alcohol*, United States Treasury Department, 1930, p. 29.

the subcommittee of the Senate on conditions existing at the end of 1925, General Andrews described the thirty denaturing plants which manufactured industrial alcohol as "nothing more or less than bootlegging organizations" and estimated the amount of alcohol illegally diverted in 1925, despite the best efforts of the Prohibition Bureau, at "somewhere in the vicinity of 13,000,000 to 15,000,000 gallons."<sup>34</sup>

A much higher estimate of diversion was submitted to the subcommittee by the United States Attorney for the Southern District of New York, who placed his figure at from 50,000,000 to 60,000,000 gallons.<sup>35</sup> No estimate demonstrably accurate was available, for the reason that bootleggers filed no statistics with the government and all figures were necessarily derived from a process of estimating how much of the enormously increased production of industrial alcohol could reasonably be explained by the growth of new industries requiring alcohol for legitimate purposes.

One gallon of industrial alcohol diverted into the hands of bootleggers was described by officials of the government as sufficient, when watered down, colored, and doctored, to manufacture a minimum of three gallons of bogus liquor.<sup>36</sup>

Accepting as reliable the smaller estimate of diversion submitted to the Senate subcommittee by General Andrews and concurred in by the chief of the Chemical Division of the Prohibition Bureau,<sup>37</sup> enough industrial alcohol was being poured into the hands of an illegal

<sup>34</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 68, 479.*

<sup>35</sup>*Ibid.*, p. 182.

<sup>36</sup>*Ibid.*, p. 113.

<sup>37</sup>*Ibid.*, p. 1313.

trade by the end of 1925 to manufacture from 156,000,000 to 180,000,000 quarts of liquor every year.

§

The last of the five chief sources of supply which constituted a problem for the Prohibition Bureau was the illicit still. Potentially this was by far the largest source. It was also the source with which the Prohibition Bureau was least equipped to deal.

With a staff whose personnel averaged 3,060 men during the first six years of enforcement, the Prohibition Bureau was plainly in no position to suppress illicit stills all over the United States. Including its office help, it had one agent to every 972 square miles of territory. Since such a staff could not effectively patrol the country, the Prohibition Bureau fell back upon the only type of action available to it within the limits of its appropriations:

(a) It appealed to the states and municipalities to help round out an inadequate staff of federal agents by using their own officers to enforce the law. "Special attention was paid," said one of the early reports of the Bureau, "to securing coöperation from prosecuting attorneys, sheriffs, police departments and peace officers."<sup>38</sup>

(b) It set at the task of detecting and raiding stills as large a part of its own staff as could be spared from other duties. Considering the number of men available for this work, the record of achievement is impressive. In 1925 agents of the Prohibition Bureau seized 29,877

<sup>38</sup>*Report of the Commissioner of Internal Revenue*, fiscal year ended June 30, 1923, p. 24.

distilleries and stills, 7,850 still worms and 134,810 fermenters.<sup>39</sup>

(c) It attempted to prevent the use of domestic stills in private homes by warning the public that the Volstead Act (Title II, Section 18) made it "unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction or recipe advertised, designed or intended for use in the unlawful manufacture of intoxicating liquor."

(d) It issued various decrees with respect to methods of home manufacture which were and were not legal. For while the Volstead Act had been precise in its provision exempting only cider and fruit juices from a limitation of one half of one per cent of alcohol, there were inevitably certain cases on the border line. Thus the Prohibition Bureau, called upon in 1922 to decide the fate of dandelion wine, ruled that this beverage was not legal, since the dandelion was not a fruit.<sup>40</sup>

It is clear, however, that to bar dandelions from kitchen kettles by administrative fiat was one thing, and to prevent a dandelion on a lawn two thousand miles from Washington from being snipped in the dead of night by a housewife bent on making dandelion wine was a very different matter. With a staff of 3,060 agents to cover the United States, the Prohibition Bureau had no actual power to execute the rules it framed concerning liquor made by a process of home manufacture. It had no power to interfere effectively with the sale of "utensils, contrivances or machines" intended to be used in private homes, though the Volstead Act had made such

<sup>39</sup>Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 64.

<sup>40</sup>New York Times, May 18, 1922.

sale illegal. It had no power to break up a commercial traffic which reinvested its capital in new equipment as rapidly as its old equipment was confiscated by the government.

Asked by the subcommittee of the Senate to report on the success achieved in suppressing illicit stills by the end of 1925, General Andrews estimated that of large commercial stills his Bureau had managed to seize "a fair percentage" and that of smaller stills "I should imagine that we did not get one in ten."<sup>41</sup>

Since 29,877 stills of all sorts had been seized in 1925 and since these stills represented no more than "a fair percentage" of large commercial stills and "one in ten" of smaller stills, it is clear that the Prohibition Bureau itself believed that a great many more than 29,877 stills remained in operation.

Approximately how many stills the Bureau did not attempt to guess.

But if there had been no more than 29,000 stills, and if they had all been small stills with a capacity of ten gallons daily, the Prohibition Bureau would have pictured here a source of supply which was capable of producing a hundred million gallons of hard liquor every year, provided it could find a market for its wares.

## §

Plainly the Prohibition Bureau had not succeeded in shutting off the sources of an illicit trade by the end of 1925. Medicinal liquor and high-test beer were still troublesome enough for the Assistant Secretary of the Treasury to plan new legislation to supplement the

<sup>41</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 447, 465-466.*

Volstead Act. On the authority of the same official, not more than five per cent of the liquor smuggled across the borders had been seized. Enough industrial alcohol was being diverted into the hands of violators of the law to manufacture on the government's own estimate 150,000,000 quarts of liquor annually. Lacking an adequate staff of its own and effective support from various states and municipalities, the Prohibition Bureau could only hope to harry the owners of illicit stills and cause them to shift their base of operations as frequently as possible.

So far was the Bureau from a successful solution of its chief problems that the question arises whether its real function in the early years of prohibition was properly understood. Called upon suddenly to undertake a formidable task with which the federal government had no previous experience, confronted by stubborn opposition in many urban sections of the country, and effectively hamstrung by Congress in the matter of appropriations, it seems likely that the real mission of the Bureau was not to enforce the law effectively, something which could not be done with the funds at its disposal, but to go through the motions of enough enforcement to give Congress a clean bill of health and simultaneously to encourage that part of the public which liked the law to believe that better days lay just ahead.

On this policy the Prohibition Bureau had embarked at the start of the adventure, probably less with a conscious desire to vindicate Congress than because the early heads of the Bureau were themselves sincere friends of the law and men of a profoundly optimistic cast of mind.

Mr. John F. Kramer, the first Commissioner of Prohibition, had begun his administration by assuring the

country that the government would see that liquor was not manufactured, "nor sold, nor given away, nor hauled in anything on the surface of the earth nor under the sea nor in the air."<sup>42</sup>

Major Roy A. Haynes, who succeeded Mr. Kramer in 1921, keyed his own statements to the public in the same sanguine mood, in various cheerful prophecies which stand in sharp contrast to the humdrum figures later submitted to the Senate subcommittee by General Andrews. From the bulletins of Major Haynes, extending over a period of several important years in this experiment, flowed constant encouragement to the friends of prohibition to believe that the corner had been turned at last and that satisfactory enforcement of the law required only patience and a little courage.

Thus in January, 1922, Mr. Haynes announced that enforcement of the law was "rapidly approaching the highest point of its efficiency" and that "the Amendment is being enforced to an even greater extent than many of its devoted friends anticipated."<sup>43</sup> During the same month he gave to the press a statement citing figures to prove that 17,500,000 people had already stopped drinking as a result of prohibition—"a wonderful record."<sup>44</sup> In September of the same year, addressing a convention at Winona Lake, Indiana, he declared that while the cost of enforcing the law during the previous twelve months had been \$9,500,000, the "various fines, assessments and taxes amounted to nearly \$62,000,000"<sup>45</sup>—a return on each dollar invested of

<sup>42</sup>New York Sun, January 4, 1920. Cf. Chapter III, *supra*.

<sup>43</sup>New York Times, January 9 and 15, 1922.

<sup>44</sup>Ibid., January 15, 1922.

<sup>45</sup>Associated Press dispatch, Winona Lake, Ind., September 2, 1922.

better than six to one. In a message addressed to the country a few months later, on Christmas Eve, he announced his discovery that "the home brew fad is taking its final gasp."<sup>46</sup>

This cycle of good cheer continued uninterruptedly from one year to another. In April, 1923, Major Haynes informed the public that "bootleg patronage has fallen off more than fifty per cent" and that "the redistillation of denatured alcohol is now impossible."<sup>47</sup> In July he announced that moonshining in the cities was "on the wane"; "there is less of it to-day than at any time since national prohibition became the law."<sup>48</sup> In August he declared that the business of bootlegging had reached a "desperate plight"; "the death rattle has begun."<sup>49</sup> By December he was certain that the progress made by the Prohibition Bureau had been "nothing short of marvelous. . . . There is but little open and above-board drinking anywhere."<sup>50</sup>

Whether these confident reports from headquarters were interpreted by the public as a running comment on the actual conditions of enforcement, or whether they seemed to carry in themselves evidence of ardent and devoted propaganda, it is impossible to say.

In any case, breathing hope and enthusiasm and assurance that all was well, they must have made good reading for the dry majority of Congress. For they suggested that nothing more was needed to enforce this law than had already been provided.

<sup>46</sup>Associated Press dispatch, Washington, December 24, 1922.

<sup>47</sup>*Ibid.*, April 9, 1923.

<sup>48</sup>*New York Times*, July 19, 1923.

<sup>49</sup>*Ibid.*, August 26, 1923.

<sup>50</sup>*Ibid.*, December 24, 1923.

This was precisely the kind of talk that Congress liked to hear.

## §

Certainly if the Prohibition Bureau aimed to do nothing else during these early years, it aimed at least to convince the country that its goal lay always near at hand and that one more trial would bring success. Time and again, whenever the public showed signs of losing faith that this law could ever be enforced successfully, the Prohibition Bureau either announced the start of some fresh effort or reorganized its work on some new plan designed to win back confidence.

The orbit of these reorganizations was familiar. It would be complained in the press or in the pulpit that in some locality the law was being flouted on all sides. A tired and somewhat disillusioned official of the Prohibition Bureau would admit that without adequate funds the problem was too much for him. A new official would be appointed in his place. The new official would come to his work with high hope and boundless energy. He would promptly reorganize whatever organization his predecessor had created and begin afresh. He would ask the public to be patient enough to give his plan a trial. The public would sit back to watch. Gradually conditions would return to normal. The public would again begin to doubt the possibility of enforcing the law successfully. The official would confess his heavy handicaps. A new official would be appointed. Travel in a circle would begin afresh.

Thus, in New York City, for example, Mr. James L. Shevlin, the first federal administrator appointed to this difficult assignment, admitted at the end of seven unsuccessful months in office that liquor was being

widely sold throughout the city and that with a staff of two hundred agents there was very little he could do to stop it.<sup>51</sup> One month later, Mr. Shevlin was transferred from Broadway to El Paso "in the interest of the service."<sup>52</sup> He was succeeded by Mr. Frank L. Boyd, who permitted the press to understand that he was forming an entirely new line of attack on the problem of enforcement, designed "to make illicit traffickers sit up and take notice."<sup>53</sup> Mr. Boyd lasted for three months. He took leave of his work with the statement that it was "a thankless and a hopeless task."<sup>54</sup> He was succeeded by Mr. Daniel L. Chapin, who came into office with new plans of the right way to enforce the law.<sup>55</sup> Mr. Chapin lasted for three months. He was succeeded by Mr. Ernest Langley, who announced that he would shake up Mr. Chapin's staff, set new standards for his agents, and attempt at last to give the city real enforcement.<sup>56</sup>

Meantime, in the state as well as in the city, control changed hands as often as it was necessary to inject fresh enthusiasm into the experiment for the reassurance of the public. Mr. Charles R. O'Connor, the first Prohibition Director for the State of New York, remained in office for the exceptional period of sixteen months. He resigned in May, 1921, declaring that the problem of enforcement had "seemed at times well-nigh hopeless."<sup>57</sup> He was succeeded by Mr. Harold L. Hart, who promptly announced that if the law was to be enforced it

<sup>51</sup>*New York Times*, August 12, 1920.

<sup>52</sup>*Ibid.*, September 16, 1920.

<sup>53</sup>*Ibid.*

<sup>54</sup>*New York Herald*, December 17, 1920.

<sup>55</sup>*New York Times*, February 6, 1921.

<sup>56</sup>*Ibid.*, March 20, 1921.

<sup>57</sup>*Ibid.*, May 23, 1921.

would be necessary to "name a practically new force of inspectors and entirely reorganize the office force."<sup>58</sup> Mr. Hart lasted from May until October. He was succeeded by Mr. E. C. Yellowley, who lasted from October to December, long enough to dismiss many of Mr. Hart's agents and to reorganize his methods.<sup>59</sup> Mr. Yellowley was succeeded by Mr. Ralph A. Day, who changed Mr. Yellowley's plans and dismissed fifty of his agents on the ground that they were incompetent for public service.<sup>60</sup>

Nowhere else in the whole field of federal administration did public offices change hands like this or sudden reorganizations follow one another in such profusion. The experience of New York State and New York City could be duplicated in the experience of other states and other cities. The office of Federal Prohibition Commissioner itself changed hands with the necessities of the occasion.

At the end of a year the early confidence of the first commissioner, Mr. Kramer, had been gnawed by certain doubts concerning his ability to achieve the task upon which he had embarked in the best of faith. Prohibition, he now declared, seemed to have been "to some extent forced upon whole states and especially upon large cities in which people had no sympathy whatever with the idea; in fact, they scarcely knew what the term prohibition meant." This hostility had created, "to my way of thinking," Mr. Kramer said, "the most difficult problem that any state ever undertook to solve." An enormous market had stimulated sources of production. Home stills were flourishing. "We haven't devoted much at-

<sup>58</sup>*New York Times*, July 10, 1921.

<sup>59</sup>*Ibid.*, October 21, 1921.

<sup>60</sup>*Ibid.*, October 5, 1922.

tention to this question. In fact, we are somewhat afraid to do so, lest we might thereby create a reaction against the law.”<sup>61</sup>

At this point, having uttered various heresies not in keeping with his rôle, Mr. Kramer took leave of public office: to be succeeded by Major Haynes, who at once discarded the plans developed by his predecessor, declared that Mr. Kramer’s theory of organization had been “clearly demonstrated after a thorough trial to be a failure,”<sup>62</sup> and created an entirely new system of organization of his own: only to have this system promptly torn apart by General Andrews, who declared that it was “not accomplishing results” and that it was imperative to substitute another system.<sup>63</sup>

Over and over this process was repeated, in an effort to find the magic formula of a reorganization so ingenious that it would somehow compensate for an insufficient staff of agents. Time and again fresh courage was pumped into the adventure by a constant shift in personnel. Change followed change. Another reorganization reorganized what an earlier reorganization had just accomplished. A new bulletin predicting that this time the key to enforcement had at last been found was broadcast to the public before the echo of its predecessor died. To the best of its ability the Prohibition Bureau kept alive the faith that despite a paralyzing lack of men and money its task could be accomplished.

It was uphill work, but there was no other course the Prohibition Bureau could have followed. It had no real alternative in the matter of enforcement. The pattern of

<sup>61</sup>New York Times, April 27, 1921.

<sup>62</sup>Associated Press dispatch, Washington, June 17, 1921.

<sup>63</sup>Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 46.

enforcement was set by greater powers than the relatively unimportant captains of an experimental subdivision of the Treasury Department. It was set in the White House by Presidents with too many other irons in the fire to propose in their budgets the sums of money which alone could have launched a determined effort to enforce the law. It was set in the offices of party bosses who raided the Prohibition Bureau for jobs for their ward heelers and protection for their friends. It was set in the halls of Congress by a dry majority which had at all times ample power to multiply its appropriations but consistently refused to act.

The law limped on. It was scarcely the business of the Prohibition Bureau to quarrel with its peers.

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## CHAPTER VI

### The Pattern of Enforcement

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NEITHER the wets nor the drys were satisfied with the situation existing at the end of 1925. The willingness of Congress to let the law shift for itself, the failure of any President to raise the issue of increased appropriations and the inadequacy of any means available to the Prohibition Bureau created a vacuum which the casual efforts of local enforcement officers did not fill. The wets insisted that the law had broken down. The drys reluctantly admitted that conditions were not what they desired. Without losing faith either in the merit of the law or in the theory that only a stubborn minority persisted in disobeying it, they found themselves propelled into an increasingly critical attitude toward the methods employed by the government in its effort at enforcement.

This change was clearly reflected in various statements issued from prohibition headquarters in 1925. In place of the earlier assurances that enforcement was steadily gaining ground, that there was no need for friends of the law to be concerned and that a dry Congress could be relied upon to do its duty, there now appeared a series of statements indicative of increasing restlessness over the course which events had followed.

On behalf of the Anti-Saloon League Mr. Wheeler

complained that due to the failure of Congress to take adequate steps to enforce the law "six million gallons of industrial alcohol reached the bootleggers last year."<sup>1</sup>

On behalf of the National Temperance Bureau Mr. Edwin C. Dinwiddie described the law as the victim of abuse by people in official circles who should have been its friends: "The situation is serious. Cabinet officers, Senators and other legislators and leaders find it easy to disobey the law themselves and they have been known to use their influence to free their henchmen after they have been caught in the toils of the law."<sup>2</sup>

On behalf of the United Committee for Prohibition Enforcement Mr. Clinton Howard insisted that "prohibition has been enforced half-heartedly at best and with definite intention that it be broken, at worst; the law has not been enforced beyond the point where, in the opinion of the enforcers, it would hurt the party in power by enforcing it."<sup>3</sup>

Meantime, a militant prohibition organization actively at work in the field reported that "rampant lawlessness" was "increasing by leaps and bounds" in a theoretically dry section of the country:

"Dubuque boasts of 41,000 citizens and 1,000 bootleggers," said a statement issued in May, 1925, by the Anti-Saloon League of Iowa, "not to mention the countless moonshiners who operate in the city and vicinity. So keen has become the competition among the hundreds of moonshiners who live on the jungle-like isles of the Mississippi and in the fastnesses of the heavily wooded bluffs that the largest manufacturer cut his

<sup>1</sup>Associated Press dispatch, Washington, March 8, 1925.

<sup>2</sup>New York *Times*, November 6, 1925.

<sup>3</sup>*Ibid.*, December 4, 1925.

wholesale price in half during the past three weeks. The islands and bluffs are swarming with stills, some of which turn out huge quantities of liquor.”<sup>4</sup>

Such statements as these were fairly typical of an increasingly persuasive suspicion on the part of the prohibition organizations that more could be done to enforce the law than was being done in 1925.

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Meantime, the actual pattern of enforcement had achieved a certain familiar outline after six years of experiment. By 1925 the first important symbol of enforcement was the “drive.”

It was more or less inevitable that this should be the case. If Congress had equipped the executive department with a different type of machinery for enforcement of the law, the administration of prohibition in the United States might have borne more resemblance to the administration of the average law than was apparent in the circumstances. Drives were a new phenomenon. Various other laws which involved the risk of evasion by many thousand people were enforced without recourse to sporadic round-ups. This was true, for example, of the pure food laws and the income tax. In the case of such legislation Congress had struck an equilibrium between the amount of willing compliance which it could expect on the public’s part and the amount of force which had to be applied in order to coerce that fraction of the public which declined to accept the law as reasonable and just.

No such equilibrium had been achieved by Congress

<sup>4</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 383.*

in the case of prohibition. Public opinion was seriously divided. Lacking a close approximation to unanimous opinion, and attempting to apply coercion with too small a staff to meet all of its problems simultaneously, the federal government was constantly compelled to mobilize part of its staff in some special place for the achievement of some special purpose, neglecting, meantime, various other problems which it hoped to take up later.

This was the origin of the prohibition drive, and by 1925 the regular routine of enforcement was to pyramid fresh offensives on familiar fronts as rapidly as the Prohibition Bureau could complete an orbit of its more stubborn problems. One favorite battleground for such an effort was along the Atlantic Coast, where a flotilla of rum-runners was constantly reassembling at a different point from the point at which it was dispersed. A second battleground was along the borderline between Canada and the United States, where drive followed drive with unfailing regularity, as frequently as the Prohibition Bureau could devote its major interest to the problem of preventing smuggling.

The first such drive began in August, 1921, when it was announced that federal and state officials would pool their forces in an effort to put an end to an illicit traffic which had reached formidable proportions during the first eighteen months of prohibition.<sup>5</sup>

The second drive began in the summer of the following year, when a fresh supply of men, this time reinforced with "naval craft, Coast Guard cutters, airships, armored trucks and high-powered motor cars" was sent to the border by the federal government.<sup>6</sup>

<sup>5</sup>Associated Press dispatch, Detroit, August 15, 1921.

<sup>6</sup>New York *Times*, July 29, 1922.

The third drive followed in June, 1923, when it was reported that "every available prohibition agent in the country" would be brought to Detroit for a fresh effort.<sup>7</sup>

The fourth drive began in December of the same year, when "the greatest assemblage of federal enforcement officers ever seen in Michigan" gathered at Detroit;<sup>8</sup> the fifth in May, 1925, when "for the first time all the government's activities" were "being concentrated on the border in a terrific drive";<sup>9</sup> and the sixth in the following August, when it was announced that "no limit" would be placed on the size of the border patrol "at every strategic point between the Great Lakes and the Atlantic."<sup>10</sup>

None of these drives, as was promptly demonstrated by the necessity of initiating its successor, succeeded in reaching its objective. None could reasonably be expected to furnish a satisfactory substitute for a staff of agents large enough to deal with the problem of smuggling systematically rather than in sudden spurts.

The fact remains that when one drive had failed, the Prohibition Bureau had no recourse save to start another.

§

On a local scale the counterpart of the national drive was the endless series of minor raids initiated by the same inadequate staff of federal agents wherever they suspected that liquor was being sold after it had crossed the border or after it was ready for distribution from some domestic source. Such raids were directed at a

<sup>7</sup>Associated Press dispatch, Detroit, June 13, 1923.

<sup>8</sup>*Ibid.*, December 5, 1923.

<sup>9</sup>New York *Times*, May 15, 1925.

<sup>10</sup>*Ibid.*, August 5 and 9, 1925.

wide variety of places, of which restaurants, hotels, amusement parks, roadhouses, cabarets, pool rooms, and delicatessen stores were the commonest examples.

In the years from 1921 to 1925 the activities of the federal government in this type of work increased at a steadily accelerating pace. In 1921 agents of the Prohibition Bureau seized 413,987 gallons of hard liquor in the course of their raids in different sections of the country; in 1925 they seized 1,102,787 gallons.<sup>11</sup> In 1921 they seized 4,963,005 gallons of beer and other malt liquors; in 1925, 7,040,537 gallons. Between 1921 and 1925 the amount of wine, cider, mash, and pomace confiscated by the federal government rose from 428,303 gallons to 10,572,933 gallons, an increase in six years' time of 2368 per cent.<sup>12</sup>

If it is difficult to appreciate the meaning of these enormous figures by considering them as abstract numbers, it is at least possible to suggest the character of the problem which they represented, and the tireless ingenuity which was forced upon the government in dealing with this problem, by considering the individual activities of two federal agents who have left an indelible impression behind them in the history of prohibition in New York. These two agents are Izzy Einstein and Moe Smith. Fantastic as their story seemed to be in 1925, judged in the light of the activities which the public had hitherto associated with the responsibilities of the federal government, the sheer extravagance of

<sup>11</sup>Figures cited in this paragraph are quoted from *Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 64.

<sup>12</sup>Figures of the seizures made by agents of the federal government in each year from 1920 to 1929 will be found in Appendix G.

the exploits upon which these agents of the law embarked was in itself a revealing measure of the task confronting the federal government when it found itself unable to control the sources of production of illegal liquor and compelled to pursue the supply in driplets, in the rôle of a detective.

Izzy and Moe disguised themselves as automobile cleaners, raided a garage on West Broadway, and seized nine barrels of beer and 244 cases of whisky.<sup>13</sup> They disguised themselves as milk drivers, carrying customers' account books, visited nine saloons on the East Side of New York, seized a quantity of liquor, and made seventeen arrests.<sup>14</sup> They disguised themselves as grave diggers, raided a speakeasy across from Woodlawn Cemetery, and confiscated fifty barrels of alcohol.<sup>15</sup>

For purposes of other raids, and in each case with comparable success, they took to the streets disguised as vegetable venders, as fishermen, as horse dealers, as street-car conductors, as churchgoers in the Palm Sunday parade along Fifth Avenue, and as salesmen of a wholesale grocery concern, offering turkeys to the Thanksgiving trade.<sup>16</sup> On his own score, and without benefit of assistance from his usual companion, Izzy appeared in the rôle of a thirsty motorman, a football player in Van Cortlandt Park, a patron of a suspicious pawnshop, an iceman catering to saloons in Brooklyn, a trombone player offering to treat new friends at the

<sup>13</sup>New York *World*, January 5, 1923.

<sup>14</sup>*Ibid.*, November 2, 1921.

<sup>15</sup>*Ibid.*, March 4, 1922.

<sup>16</sup>New York *Times*, November 22, 1922; *Ibid.*, July 17, 1923; New York *Herald*, January 26, 1922; New York *World*, June 9, 1921; *Ibid.*, April 10, 1922; New York *Times*, November 27, 1922.

Yorkville Casino and an actor who joined the Fern Club under the pseudonym of Ethelbert Santerre.<sup>17</sup>

Certainly in the pursuit of illicit liquor through the labyrinth of New York City no more substantial contribution was made to enforcement of the law than by these two resourceful agents. Their superior officers in the Prohibition Bureau credited them with responsibility for twenty per cent of the cases brought to trial.<sup>18</sup> The Supreme Court of the United States honored them on one occasion by upholding their interpretation of the law.<sup>19</sup> When the time came finally for the government to dispense with their services, presumably on the theory that a too generous publicity had robbed them of their usefulness, Mr. Wayne B. Wheeler and other friends of prohibition interceded unsuccessfully in their behalf.<sup>20</sup>

Damon and Pythias in the armor of enforcement, through four years of raids and round-ups the enterprising figures of Izzy and Moe appeared in silhouette against the cynicism of the city as symbols of the law.

### §

There was one unmistakable characteristic of prohibition raids, whether undertaken by federal agents or by local police officials: the energy and the frequency of such raids varied with the degree of criticism to which the federal or local government found itself ex-

<sup>17</sup>New York *Tribune*, July 12, 1921; New York *Herald*, October 31, 1921; New York *Times*, April 12, 1923; New York *Tribune*, June 21, 1921; New York *Times*, March 26, 1922; *Ibid.*, July 23, 1925.

<sup>18</sup>New York *Times*, May 18, 1922.

<sup>19</sup>Associated Press dispatch, Washington, April 13, 1925.

<sup>20</sup>New York *Times*, November 20, 1925.

posed. When public interest in the law was at low ebb and the public's mind was more engaged with Wall Street or with summer sports than with the question of enforcement, raids as a rule were at their minimum. When something suddenly occurred to stimulate interest in the law and to focus public attention sharply, if momentarily, on the question of enforcement, raids frequently picked up with astonishing celerity.

A case in point may be cited from the experience of Chicago. In November, 1921, the administration of the law in that city was proceeding in a quiet manner when the *Chicago Tribune* published the results of a survey of local conditions of enforcement. At least 4,000 saloons, the *Tribune* found, were operating in Chicago. "Practically 100 per cent of them are selling some kind of beer, some sort of whisky, and some unbranded wine." It was no trouble for a stranger to obtain liquor if he wished it. Drinks could be purchased openly. No guile and no acquaintanceship with the city's ways were needed. "The saloons are far less cautious than they were a year or eighteen months ago."<sup>21</sup>

The sequence of events following publication of the *Tribune's* survey was a rallying of public interest in the question of enforcement, a considerable amount of popular discussion, and a sudden burst of activity in the Police Department. According to the Associated Press: "Real prohibition has arrived for Chicago's 2,800,000 inhabitants, Chief of Police Fitzmorris announced to-night in an edict ordering the city's 5,300 policemen to rivet the lid down 'until it squeaks.' . . . The chief announced that all the teeth of the state dry act, counted even more drastic than the federal prohibition law, would be utilized 'to make Chicago so

<sup>21</sup>*Chicago Tribune*, November 10, 1921.

dry that a sponge can be wiped across it without picking up a drop of liquor.'"<sup>22</sup>

For a few days the wires hummed with news of this offensive. Five hundred arrests were made in Chicago in the course of one day's round-ups.<sup>23</sup> A "dress-suit squad" was formed in the Police Department to apprehend "exclusive society violators of the law" in well-known hotels and restaurants.<sup>24</sup> So many arrests were made in a few days' time that the city chemists could not keep pace with the police in their analyses of liquor seized.<sup>25</sup> At the end of a week of strenuous activity, however, the offensive began gently to taper off. At the end of a second week it seemed to have come to rest. At the end of a month it was a golden memory.

When it appeared again, it was under different auspices and after the passage of two years. A reform mayor, William E. Dever, had been elected in the meantime. In 1923 the press reported him as believing that the city was wide open and as insisting that the police enforce the law.<sup>26</sup>

Once more a series of determined raids began. One hundred suspected violators of the law were arrested on the first day, three hundred on the second, three hundred on the third.<sup>27</sup> "The mayor made it clear today," said the dispatches from Chicago, "that he did not intend to stop until he had closed every one of the six thousand 'soft-drink parlors' in the city, which are saloons operating under a false front. He declared that

<sup>22</sup>Associated Press dispatch, Chicago, December 15, 1921.

<sup>23</sup>New York *Times*, December 19, 1921.

<sup>24</sup>Associated Press dispatch, Chicago, December 21, 1921.

<sup>25</sup>*Ibid.*, December 20, 1921.

<sup>26</sup>New York *Times*, October 4, 1923.

<sup>27</sup>*Ibid.*, October 5, 6, 7, 1923.

he will make Chicago a dry city inside of thirty days if he has to dismiss every captain and lieutenant in the Police Department.”<sup>28</sup>

There can be no question of the integrity of the mayor’s intention and no question that he failed. Whatever the fate of the soft-drink parlors, the sources of production flourished. “No man knows whether there are five thousand or eight thousand or ten thousand or twenty thousand stills in Chicago,” Mayor Dever testified when he appeared as a witness before a committee of Congress, two years after this revival of enforcement in Chicago. “But that the stills are there, and that they are there in threatening numbers, I have not the slightest doubt.”<sup>29</sup>

## §

On a somewhat more elaborate scale this sequence of events was repeated in Philadelphia. The experience of the latter city offers, in fact, an unusually clear illustration of the methods used and the results achieved by police departments acting under pressure.

As in the case of Chicago, the impetus for a sudden outburst of activity in Philadelphia was provided by a sharp criticism of existing conditions, issuing from a source sufficiently authoritative to challenge public interest. In an address delivered before the state convention of the Woman’s Christian Temperance Union toward the end of 1923, Governor Gifford Pinchot charged that the Philadelphia police were making “practically no effort” to obtain enforcement and that

<sup>28</sup>*New York Times*, October 6, 1923.

<sup>29</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 1390.

saloons were operating in open defiance of the law. "In one saloon," he said, describing the results of a personal tour of observation, "the law-breaking drinkers surrounded the illegal bar four deep. It was easy to find, for there was as little secrecy about it as there is about the Washington Monument. Crowds walked in and out. A policeman stood at the very door."<sup>30</sup>

This criticism of conditions of enforcement, made by the Governor of the state, coincided with the election of a new mayor in Philadelphia, Mr. W. Freeland Kendrick, who volunteered to give the law a different type of administration under a more aggressive Director of Public Safety.

With this end in view Mr. Kendrick appealed to the President in December, 1923, for a loan of the services of Brigadier-General Smedley D. Butler of the United States Marine Corps. General Butler had no previous experience as a prohibition officer, but he was a strong disciplinarian whose complete independence of local politics was a demonstrated fact. To his new public in Philadelphia he announced that he had not sought this position and did not particularly want it, but that having accepted it he was "going to do it right or not at all."<sup>31</sup> He had heard it said that prohibition could not be enforced. "That is silly. Any law can be enforced precisely as it is written if the men responsible want it done."<sup>32</sup> He promised Philadelphia that he would give the city law enforcement "impartially and without fear," regardless of political pressure, even if he were "torn apart in the attempt."<sup>33</sup>

<sup>30</sup>Associated Press dispatch, Erie, Pa., October 6, 1923.

<sup>31</sup>New York *Times*, December 23, 1923.

<sup>32</sup>*Ibid.*

<sup>33</sup>Associated Press dispatch, Philadelphia, December 16, 1923.

With this much by way of prelude, General Butler took command of the Police Department on January 7, 1924, and immediately the guns began to roar. Nine hundred and seventy-three saloons were closed in his first five days in office, the new Director of Public Safety announced on January 11th.<sup>34</sup> Two thousand arrests were made in round-ups during his second week in office.<sup>35</sup> Four hundred policemen were shifted overnight in an attempt to improve the morale of the police force.<sup>36</sup> Eight police lieutenants were suspended for failure to rid their districts of saloons on forty-eight hours' notice.<sup>37</sup>

Meantime, the city's sixteen hundred firemen were invited by General Butler to "pitch in and help enforce the law."<sup>38</sup> Fruit stores, pool rooms, restaurants and garages were searched industriously for liquor.<sup>39</sup> So-called "best society" was warned that the time had come when it would not be permitted to trifle with the law. "The day has passed in Philadelphia," announced the Director of Public Safety, "when societies and organizations can hold banquets in big hotels and serve liquor. We don't care who is holding them. We will arrest all the 'four hundred' if we catch that many in possession of illegal liquor."<sup>40</sup>

Here, certainly, was an enforcement officer made to order for those eager friends of prohibition who believed that what the situation needed was energy and a little

<sup>34</sup>New York Times, January 12, 1924.

<sup>35</sup>Ibid., January 20, 1924.

<sup>36</sup>Associated Press dispatch, Philadelphia, January 25, 1924.

<sup>37</sup>New York Times, January 11, 1924.

<sup>38</sup>Ibid., January 17, 1924.

<sup>39</sup>Ibid., January 19, 1924.

<sup>40</sup>Ibid., January 11, 1924.

backbone. "What General Butler has done in Philadelphia in a few short weeks can be done throughout the entire country if the people will rise up and support the law," declared Mr. Josephus Daniels in an interview in Philadelphia. "As soon as Butler is finished here he should be called to Washington and made national prohibition enforcer."<sup>41</sup> Similar statements appeared in other quarters. From a state conference of the Methodist Church in New Jersey came a message of congratulations, expressing hope that action comparable with General Butler's would promptly "be taken in every town and every city in New Jersey."<sup>42</sup>

For the moment, enthusiasm unquestionably ran high. Under pressure of events, however, General Butler's experiment gradually assumed a somewhat different form. The public began to hear less of raids, of round-ups, and of ultimatums, and more of factional disputes, of disagreements behind the scenes and of quarrels with the politicians.

Thus in April, 1924, General Butler informed the press that he had been "double-crossed" by some of the men closest to him in the Police Department.<sup>43</sup> In July there were reports of a disagreement with the mayor which threatened to lead to a crisis but ultimately ended in a reconciliation.<sup>44</sup> In April, 1925, after his leave of absence from the Marine Corps had been extended for a second year, there came more serious reports that General Butler himself was tiring of his responsibilities. Enforcing the law in Philadelphia, he now informed

<sup>41</sup>*New York Times*, February 9, 1924.

<sup>42</sup>Associated Press dispatch, Atlantic City, March 8, 1924.

<sup>43</sup>*Ibid.*, Philadelphia, April 8, 1924.

<sup>44</sup>*New York Times*, July 21, 1924; Associated Press dispatch, Philadelphia, October 2, 1924.

the Associated Press, "is worse than any battle I was ever in. . . . The petty annoyances that are piled on me are worse than the Chinese drip torture."<sup>45</sup>

This theory of his responsibilities he expanded in September. "The path of law enforcement," he insisted, "has been blocked by powerful influences, by legal machinery that should have been an aid, and by the invocation of technicalities." So formidable were these obstacles that in General Butler's opinion, "enforcement of prohibition in this city is virtually stopped." This was a disillusioning conclusion for an enforcement officer who had begun his work in all good faith, but the trouble lay deep down. "Law enforcement on an absolutely even basis has not had the support of the people of Philadelphia and does not have it now."<sup>46</sup>

Three months later, confessing that he was not reluctant to be leaving Philadelphia—"the job isn't worth staying for—a waste of time"<sup>47</sup>—General Butler took leave of the post which he had filled for two eventful years. The conditions which he had come to correct admittedly lived after him. So did the method of enforcement to which he had given fresh vigor and publicity.

Long after General Butler had returned to the marines and a quieter life in another section of the country, Police Unit No. 1, which he had created for special enforcement work in his first days in Philadelphia, still plugged ahead at the task to which he had assigned it. On Christmas night in 1926 it completed its ten-thousandth raid.<sup>48</sup>

<sup>45</sup>Associated Press dispatch, Philadelphia, April 21, 1925.

<sup>46</sup>New York *Times*, September 13, 1925.

<sup>47</sup>Associated Press dispatch, Philadelphia, November 21, 1925.

<sup>48</sup>New York *Times*, December 26, 1926.

## §

In the statement in which he announced his departure from Philadelphia, General Butler reported that one of the greatest handicaps with which he had had to contend was the difficulty of enforcing prohibition in the courts. Of more than six thousand people arrested for alleged violations of the law during his second year in office, he pointed out that only 212 had been convicted. This was a discouragingly small percentage. "The result clearly shows," it seemed to General Butler, "that enforcement hasn't amounted to a row of pins after the arrests were made."<sup>49</sup>

In calling attention to this chapter of his experience in Philadelphia, General Butler was in reality calling attention to one of the major characteristics of the pattern of enforcement not only in Philadelphia but in the country as a whole. The second half of the effort to enforce prohibition with an insufficient staff of agents was the problem of imposing adequate penalties for violations with an insufficient staff of judges and attorneys in the courts.

This problem had appeared in miniature form at an extremely early date in the history of prohibition. As an earlier chapter has pointed out, the United States District Attorney for Chicago had reported in June, 1920, that the federal courts in that city were already five hundred cases behind schedule and Attorney General Palmer had appeared before the Appropriations Committee of the House of Representatives in the following December to insist that the federal

<sup>49</sup>New York *Times*, September 13, 1925.

judiciary could not handle the flood of prohibition cases without more help from Congress.<sup>50</sup>

This warning was repeated by Mr. Palmer's successor in the Department of Justice. In his first report as Attorney General Mr. Harry Daugherty pointed out that the number of unfinished prohibition cases pending in the courts had increased from 2,196 to 10,365 in a single year and urged the creation of eighteen new federal judges at large, to be assigned as needed.<sup>51</sup>

So much of a problem had violation of this law become, from the point of view of the courts, that as early as the second year of prohibition Mr. Daugherty was already experimenting with the same plan for trials without jury, before United States Commissioners, which was to provoke a sensation in the headlines when it was recommended to the country nine years later by the Wickersham commission. In April, 1921, the Associated Press reported his belief that such a plan, relieving the federal courts of a responsibility which promised to engulf them, would aid materially in the enforcement of the law, particularly in the larger cities.<sup>52</sup>

From 1921 to 1925 this problem of relief for a hard-pressed judiciary steadily increased in importance rather than diminished. In 1922 the number of arrests by federal officers rose from 34,175 to 42,223, the number of prosecutions begun in the federal courts from 29,114 to 34,984, and the number of cases unfinished at the end of the year from 10,365 to 16,713.<sup>53</sup>

<sup>50</sup>Chapter III, *supra*.

<sup>51</sup>*Report of the Attorney General of the United States*, fiscal year ended June 30, 1921, pp. 101, 4.

<sup>52</sup>Associated Press dispatch, Washington, April 21, 1921.

<sup>53</sup>The figures cited here and in the three following paragraphs are quoted from *Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, pp. 64, 70.

In 1923 federal arrests again increased, in this case from 42,223 to 66,936; prosecutions increased from 34,984 to 49,021; cases pending at the end of the year increased from 16,713 to 23,060. Commenting on the situation in which the federal courts now found themselves, the Department of Justice took occasion to observe: "The reports would seem to indicate that the crowded condition of the federal dockets is due for the most part to the fact that the prohibition burden is not being shared by the state courts, except in one or two states, notably Kansas and Wisconsin. It seems possible that other states could reduce the number of pending cases if they so desired."<sup>54</sup>

In 1924 arrests once more increased, this time from 66,936 to 68,116; there was a slight decrease in the number of prosecutions and the number of unfinished cases, which dropped from 49,021 to 45,878 and from 23,060 to 22,329, respectively. The situation remained difficult enough, however, for the Department of Justice to assert in its annual report that "the United States courts to-day are staggering under the load imposed on them by prohibition legislation."<sup>55</sup>

Finally, in 1925, while the figures of the Prohibition Bureau for arrests by federal officers showed their first slight falling-off since the start of this experiment, diminishing from 68,116 to 62,747, the figures of the Department of Justice for prosecutions in the courts reached the highest point on record, mounting from 45,878 to 50,743. Unfinished cases on the dockets at the end of the year also set a new high record, annulling

<sup>54</sup> *New York Times*, January 10, 1923.

<sup>55</sup> *Report of the Attorney General of the United States*, fiscal year ended June 30, 1924, p. 79.

the decrease of the previous year and advancing from 22,329 to 24,684.<sup>56</sup>

At this point, in the first six months of 1925, the Department of Justice now initiated more than three times as many cases as it had handled in the first six months of 1920. The docket of its unfinished cases had increased by 1024 per cent in five years' time.

§

It was in an effort to find some instrument of enforcement which would not give the federal courts more business than they could profitably handle, and an effort to supplement its policy of raids and drives with something which would not melt away in the fashion of General Butler's arrests in Philadelphia, that the Prohibition Bureau evolved its policy of padlocks. There had been a certain amount of experiment with this method in 1921. But it was "in the fall of 1922," as Major Haynes described the development of the policy, "that someone hit upon this tool. It was labeled 'injunction.' It could be used, it was argued, under Sections 21, 22, 23, and 24 of the National Prohibition Act. And so it proved."<sup>57</sup>

The sections of the Prohibition Act to which this statement of Major Haynes referred were those sections broadly defining "any room, house, building . . . where intoxicating liquor is manufactured, sold or kept" as "a common nuisance" and giving the federal government power to apply for an injunction against such a nuisance, with the provision that "upon judgment of

<sup>56</sup>Figures of the prosecutions begun in the federal courts, convictions, acquittals, pleas of guilty, cases pending, fines, etc., for each year from 1920 to 1929 will be found in Appendix H.

<sup>57</sup>New York *Times*, August 8, 1923.

the court ordering such nuisance to be abated, the court may order that the room, house, building . . . or place shall not be occupied or used for one year thereafter."

The convenience of these provisions, for the purposes of the Prohibition Bureau, lay in the character of the penalty prescribed. A series of raids on a speakeasy known to be selling liquor usually had no other effect than to interrupt its profits momentarily. Once a place was padlocked, however, at least in theory it remained padlocked for a year. Moreover, this method of procedure had the advantage of a liberal interpretation in the courts. Although some conflict of opinion appeared upon the point, a single sale accompanied by unlawful possession of other liquor on the premises was held in test cases to be sufficient to warrant the issue of a padlock injunction.<sup>58</sup>

So promising did this method of procedure seem to be, following its rediscovery in 1922, that the government took advantage of it on an increasingly large scale. In 1922, 1,270 injunctions were issued by the courts, as compared with 466 during the previous year. In 1923 the number of injunctions increased to 1,928; in 1924, to 3,342 and in 1925 to 4,471.<sup>59</sup>

Over a wide front the government sought diligently to invoke this method of procedure as a supplement to the arrests which it was making in these years. San Francisco was one of the first cities to witness the padlocking of a number of its saloons. The method was used extensively in Omaha and Detroit. In New York

<sup>58</sup>United States v. Eilert Brewing & Beverage Co., 278 F. 659 (1921); Lewisohn v. United States, 278 F. 421 (1922), certiorari denied 258 U. S. 630 (1922).

<sup>59</sup>*Padlock Procedure*, United States Treasury Department, 1930, p. 5.

City five hundred speakeasies were padlocked by an industrious federal attorney within thirteen months.<sup>60</sup> In its interest in this legislation the government brought the owners of a wide variety of buildings into court. In Chicago an entire hotel of 125 rooms was closed as a result of frequent violations of the law.<sup>61</sup> In the same city padlocks were placed on the doors of two private residences, following the conviction of occupants of these buildings on a charge of manufacturing and distributing liquor.<sup>62</sup>

So zealously was the injunction method used that in northern California the government actually succeeded in padlocking a tree. The tree was a redwood, twenty-four feet in diameter, six miles from the town of Dyer-ville. A hollow chamber in its base concealed a fifty-gallon still, operating at full capacity when it was raided. Kerosene was used as fuel, and the light smoke disappeared through a flue amid the foliage. Entrance to the chamber was concealed by a strip of canvas painted to resemble bark.<sup>63</sup>

Over this strip of canvas the government now hung a placard reading: "Closed for One Year for Violation of the National Prohibition Act."

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As might have been anticipated, the government's resort to padlocking procedure on an increasing scale from 1922 to 1925 was not accomplished without protest

<sup>60</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 102.*

<sup>61</sup>*Padlock Procedure, United States Treasury Department, 1930, p. 43.*

<sup>62</sup>*New York Times, January 25, 1925.*

<sup>63</sup>*Associated Press dispatch, San Francisco, April 8, 1926.*

on the part of a number of people, in no way involved in violations of the law, who believed this procedure to be arbitrary and unfair. Critics of the padlock method insisted that it was applied without benefit of a proper trial by jury. They insisted that it frequently penalized an innocent party who might not know that some portion of a building which he had rented to a tenant had been used for an illegal purpose. They insisted that it inflicted punishment which varied capriciously not with the character of the offense against the law but with wide variations in the value of the properties involved.

Whatever the force of these objections it is clear that the padlock method required less litigation than any other method suggested by the Volstead Act and that it was a far more effective principle of action to close the doors of a building for a year than to raid it every Monday. It is equally clear that despite these obvious advantages the padlock method failed to provide the Prohibition Bureau with a satisfactory solution of its problems. There were inherent difficulties in the padlock method, as might have been inferred from the relatively small number of padlock proceedings in the whole run of prohibition cases brought to court.

(1) Plainly the effectiveness of the padlock was measured by the circumstances of the individual case. It might make a three days' sensation in the headlines to padlock for one year a supper club patronized by a coterie of leading citizens. It was of little use to padlock a deserted warehouse where two 500-gallon stills manufactured enough liquor in a month to last a dozen night clubs for a year. The owners of such a plant simply reinvested part of their profits in new equipment and sought another site.

(2) There were certain technical difficulties of a formidable nature which had to be faced in padlock procedure. Summarizing its experience at a somewhat later date, the Prohibition Bureau pointed out that fictitious leases, oral assignments of leases, and dummy corporations were frequently used to conceal the real identity of guilty parties, and asserted, "Records show that service [in padlock cases] can not be secured in more than 50 per cent of the cases brought and that not more than 35 per cent of the cases are finally closed by order of the court."<sup>64</sup>

(3) Finally, there was the manifest difficulty of keeping a padlock locked, once the key was turned. Testifying before a committee of Congress in April, 1926, the United States Attorney for the Southern District of New York declared that one of the constantly recurring problems in this method of enforcement was the problem of preventing padlocked places from reopening for business at some convenient date after the courts had closed their doors. "We have nobody to see to that. . . . We have no way of knowing except as we rely upon the neighbors for information." For Congress, in its reluctance to tax the country heavily in the interest of enforcement, had given the executive department only twenty-three agents to handle padlock procedure in a district with a population of eight million people.<sup>65</sup>

Once more the problem of enforcement returned to the question of half-hearted interest and inadequate appropriations.

<sup>64</sup> *Padlock Procedure*, United States Treasury Department, 1930, pp. 10-11.

<sup>65</sup> *Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, pp. 188-189.

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By 1925 the pattern of enforcement was clearly defined and reasonably well standardized.

In the first place, lacking adequate personnel to handle its various problems simultaneously, the Prohibition Bureau had fallen back upon a policy of mobilizing part of its personnel for special drives. These drives were supplemented by padlock action wherever possible and by local raids on the part of both federal officers and local officers.

Raids varied in number and intensity in direct proportion to the amount of criticism current at the moment: increasing with signs of active dissatisfaction and subsiding with a falling-off of public interest. The result which they achieved was the arrest by federal officers of 313,940 suspected violators of the law during the first six years of prohibition<sup>66</sup> and the arrest by state and municipal officers of an unknown number of suspected violators, presumably much larger. It was not contended that the government had succeeded in arresting every person guilty of breaking the law, but merely that it had succeeded in arresting as many guilty persons as it could. "We do not begin to arrest all that are guilty," General Andrews told a Senate subcommittee in 1926. "We cannot."<sup>67</sup>

In the second place, while the number of arrests was too small to encompass the guilty, it was too large to be handled successfully in the courts. By the end of 1925

<sup>66</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 64.

<sup>67</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 57.

enough arrests were being made in New York City every month to occupy for an entire year the attention of such federal judges as were available for prohibition cases, assuming that the prosecution asked in each case for a jail sentence, which meant a jury trial.<sup>68</sup> At the end of a year's effort, therefore, with the judicial machinery furnished by Congress, and on the basis of a jury trial and a jail sentence for each violator, the federal courts would have found themselves with eleven years' work to handle. By the end of two years' effort they would have been twenty-two years behind schedule. In ten years they would have lost a century.

Admittedly the law was unpopular in New York. But congestion in the courts was not unique to this one district nor the exclusive result of its lack at this time of a state enforcement act. In this same year the Department of Justice reported that "United States attorneys throughout the country are handicapped by insufficient legal and clerical assistance and in many districts are prevented from promptly disposing of criminal prosecutions by the inability of the courts to give sufficient time to the holding of criminal sessions. . . . Additional judges and increased office help for United States attorneys are absolutely necessary."<sup>69</sup>

In the third place, it was clear that the law was further handicapped, particularly in the matter of jail sentences, by the unwillingness of judges and juries in many instances to impose harsh penalties. "In many districts the variance between sentences imposed for violations of the National Prohibition Act and those

<sup>68</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 104, 105.*

<sup>69</sup>*Report of the Attorney General of the United States, fiscal year ended June 30, 1925, p. 39.*

imposed for convictions of other federal crimes is striking," said the Department of Justice in its annual report for 1923. "Some courts which exact the maximum penalties in other federal crimes are reluctant to place heavy punishment on prohibition violators."<sup>70</sup>

In support of this conclusion Mr. J. J. Britt, of the legal staff of the Prohibition Bureau, informed a committee of Congress in 1925 that in such states as New York and Pennsylvania "it is very difficult to get a verdict of any great consequence in either civil or criminal cases relating to prohibition matters."<sup>71</sup> Mayor Dever of Chicago described the state judges in Cook County as deliberately indulgent. "These state judges have to go before the Chicago communities for nomination, for election. They have got to get the votes of the Chicago community. The Chicago city administration is enforcing an unpopular law. The judges, being human, see what is going on. They know they are coming up for reëlection. They know that if they are with the unpopular law they are going to be beaten for office."<sup>72</sup>

Faced with this double handicap of more cases in the courts than the courts could handle, and hostility to the law, or indifference to the law, precisely at those points where the courts were most congested, the government fell back upon the only expedient available to it in the circumstances and established its famous "bargain days."

Here justice was dispensed with a broad hand and no necessity for juries. On set days in the court calendars,

<sup>70</sup>*Report of the Attorney General of the United States*, fiscal year ended June 30, 1923, p. 86.

<sup>71</sup>*New York Times*, January 17, 1925.

<sup>72</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 1396.

large numbers of bootleggers, restaurant proprietors, hotel keepers, waiters, smugglers, distillers, and go-betweens would plead guilty to violation of the law, provided they were assured in advance that they would avoid jail sentences and escape with fines. This was the regular method of handling prohibition in the courts by 1925. Pleas of guilty, without jury trials, accounted for 90.99 per cent of the convictions obtained in the federal courts.<sup>73</sup> Enforcement of the law, as General Butler had complained, might not "amount to a row of pins after the arrests were made." There remained no other method by which the government could prevent its courts from being inundated.

It is a somewhat ironic fact that a committee of the same Congress responsible for failure to create sufficient judicial machinery to handle prohibition cases should have thrown up its hands in horror at the conditions it discovered in the courts.<sup>74</sup> The heaviest penalty for violations of the prohibition law which this committee reported in 1925 was an average jail sentence of 185 days and an average fine of \$525 in Indiana. In the eastern district of Louisiana the average jail sentence was five days and the average fine \$86. In Massachusetts the average jail sentence was three days and the average fine \$127. In the western district of Kentucky the average jail sentence was three-tenths of a day and the average fine \$148. "In New York City, in the federal court from June 23 to June 27, inclusive, Judge Clayton of Alabama sitting, the average fine imposed was \$24 in 256 cases. Nine prisoners were fined \$5, 132 were fined

<sup>73</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 70.

<sup>74</sup>*Report of a Subcommittee of the House Committee on Alcoholic Liquor Traffic*, 68th Congress, 2d Session.

\$10, five received \$15 fines, seventeen were fined \$20, and thirty were assessed \$25. Only 63 of the 256 were fined more than \$25. The maximum fine imposed was \$200, levied upon two prisoners."<sup>75</sup>

The fact of the matter is that by 1925 the government had established a new license system, differing from the old license system only in the fact that it was low-license rather than high-license.

The increasingly critical statements issued by various prohibition organizations in 1925 showed their dissatisfaction with the character of any effort as yet expended in the interest of enforcement. It is small wonder that they were disappointed.

<sup>75</sup>Report of a Subcommittee of the House Committee on Alcoholic Liquor Traffic, 68th Congress, 2d Session, p. 6.

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## CHAPTER VII

### The Battle of Propaganda

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OF THE thousands of conflicting estimates of national prohibition placed before the country at the end of 1925, these two are typical:

From Congressman Schneider of Wisconsin: "Vice, crime, immorality, disease, insanity, corruption, and a general disregard for law, directly traceable to the unenforceability of the Volstead Act, are increasing with alarming rapidity."<sup>1</sup>

From the Anti-Saloon League of America: "Industry, commerce, art, literature, music, learning, entertainment, and benevolence all find their finest expression in this saloonless land."<sup>2</sup>

To the militant leaders of the wets, the law had not only broken down, but in its breakdown saddled the American people with a heavy burden. To the militant leaders of the drys, neither the handicap of hostility which the law had encountered in the cities nor the lax conditions of enforcement of which the drys themselves complained could rob this experiment of its usefulness. The net result was clear gain, of lasting value to the country.

<sup>1</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 629.*

<sup>2</sup>*New York Times*, November 26, 1925.

On these two major themes there were many variations.

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The field of controversy over the results achieved by six years of prohibition in the United States has been plowed over many times and turned up few facts whose authenticity has not been challenged. One of these facts is unmistakable. Whatever had happened to vice, crime, and immorality—or to art, literature, and music, for that matter—Congressman Schneider and those who shared his opinion of this experiment were entitled to cite an increase in corruption in public office as one of its by-products.

There is no evidence that corruption had reached any of the chief officials of the Prohibition Bureau or that it had seeped through to other bureaus of the Treasury Department. There is certainly no evidence to support the sweeping statement that as a result of six years of prohibition the integrity of the whole government was tottering. With this much said, however, any summary of events from 1920 to the end of 1925 is bound to record the fact that prohibition had introduced into the lower ranks of the federal service, and both the lower and upper ranks of many local governments, a type of corruption which was widespread, stubborn and destructive.

Evidence of this corruption appeared on many sides and in many sections of the country.

In March, 1923, indictments charging illegal sale and transportation of intoxicating liquor were brought against seventy-five citizens of the city of Gary, Indiana, including the mayor, a judge of the City Court, a former prosecuting attorney and various police

officers, deputy sheriffs, bootleggers, and proprietors of speakeasies. Fifty-five of the seventy-five defendants were found guilty. The mayor was fined \$2,000 and sentenced to eighteen months in prison. The other fifty-four received jail sentences ranging from one day to one year and fines of from \$100 to \$500.<sup>3</sup>

In May, 1921, charges of extortion and conspiracy to violate the Volstead Act were brought against twenty-three justices, ex-justices, aldermen, and sheriffs in Fayette County, Pennsylvania.<sup>4</sup>

In April, 1925, fifty-eight policemen and prohibition agents, found guilty of conspiracy to violate the law, were sentenced to prison terms in the United States District Court at Cincinnati.<sup>5</sup>

In October, 1921, warrants were issued at Philadelphia for the arrest of agents of the federal government involved in a conspiracy by which liquor valued at \$15,000,000 was withdrawn from distilleries in Pennsylvania, New York, New Jersey, Maryland, Illinois, Indiana, and Kentucky by means of fraudulent permits.<sup>6</sup>

In August, 1925, a Controller of Customs at New Orleans, a police captain, a sheriff, the brother of a state Senator, and twenty-seven others were indicted for participation in what was described by Treasury officials as "one of the largest liquor conspiracies as yet uncovered in this country."<sup>7</sup>

In September, 1924, warrants were issued for the arrest of two state officials and sixty-seven citizens of

<sup>3</sup>Associated Press dispatch, Gary, Ind., April 28, 1923.

<sup>4</sup>Ibid., Uniontown, Pa., May 19, 1921.

<sup>5</sup>Ibid., Cincinnati, April 22, 1925.

<sup>6</sup>Ibid., Philadelphia, October 20, 1921.

<sup>7</sup>New York Times, September 13, 1925.

Little Rock, charging conspiracy against the prohibition law.<sup>8</sup>

In December, 1921, one hundred agents of the federal government in New York City were dismissed as the result of an investigation into the abuse of permits for the use of intoxicating liquor.<sup>9</sup>

It is fair to say that such cases as these, involving charges of corruption on the part of as many as twenty, thirty, fifty, or even a hundred officials at a single time, were exceptional cases in the experience of the law. The usual thing was the dismissal of one agent here, two agents there, the indictment of a half dozen policemen in Chicago, or the conviction on charges of conspiracy of a Federal Prohibition Commissioner for Ohio.<sup>10</sup>

In this form, cases of corruption appeared and reappeared in the news of prohibition with marked regularity. So conventional had a certain amount of bribery become, by the end of a few years, that the prohibition agent dismissed for issuing a false permit and the police officer indicted on a charge of extorting funds from the owner of a speakeasy anxious to protect his trade were as familiar figures in the pattern of enforcement as a new drive on the border, a sudden flurry of raids designed to quiet criticism in the press, the appearance and the disappearance of a General Butler, the locking of a padlock on a new saloon, or the announcement of a new plan to relieve congestion in the courts. It was presumably to this fact that the President of the United States referred when he said of prohibition in 1922 that "there are conditions relating

<sup>8</sup>New York *Times*, September 15, 1924.

<sup>9</sup>Ibid., December 11, 1921.

<sup>10</sup>Associated Press dispatch, Cleveland, June 10, 1925.

to its enforcement which savor of nation-wide scandal. It is the most demoralizing factor in our public life.”<sup>11</sup>

How many state and municipal officials were actually found guilty of corruption in these early years of prohibition it is impossible to say. States and municipalities do not make it their practice to keep such records. Nothing better exists by way of an official estimate than the opinion of Commissioner Haynes that bribes had been offered freely to “sheriffs, constables and peace officers by all titles” and that “those who have been caught are, doubtless, but a fraction of those who are guilty.”<sup>12</sup>

From the federal government itself, however, accurate figures are available. By February 1, 1926, at the end of six years of prohibition, 875 agents of the enforcement service had been dismissed on the score of such offenses as bribery, extortion, solicitation of money, conspiracy to violate the law, embezzlement, and submission of false reports.<sup>13</sup>

That this list of dismissals measured the full extent of corruption in the Prohibition Bureau seems unlikely. Presumably there were agents shrewd enough to conceal evidence of misconduct until they had left the service of the government. Presumably there were other agents, less fortunate in this respect, who were saved from dismissal by the interference of a politician capable of exercising pressure. Assuming, however, that the list of 875 dismissals was an accurate index of corruption, and accepting General Andrews’s estimate that in six years’ time some 10,000 men had passed in and out of the Prohibition Bureau for the purpose of filling an

<sup>11</sup>Message to Congress, December 8, 1922.

<sup>12</sup>New York Times, August 5, 1923.

<sup>13</sup>Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 92.

average of 3,060 jobs, the number of agents dismissed for corruption was approximately one out of twelve.

This was not an entirely unprecedented figure. As Senator Harreld of Oklahoma pointed out, "One out of twelve of the disciples went wrong,"<sup>14</sup> and this was certainly no worse. Yet within the experience of the federal government it was novel. No other bureau in Washington shared the experience of the Prohibition Bureau in these years. No other bureau found it necessary to discharge one twelfth of its employees for a breach of trust. Whatever precedent for these figures existed elsewhere, it seems clear that a great deal of confusion would have arisen in the United States, if at every point in its wide contact with the public the federal government had been 8 per cent dishonest.

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There was one unexpected way in which corruption in the enforcement of the Eighteenth Amendment, however much to be deplored, brought a certain sense of reassurance to the friends of prohibition. It is needless to say that they regretted the existence of corruption, sought in various ways to help bring it to an end, and believed that the law could be enforced much more effectively without it. The fact remains that since the law was not effectively enforced, corruption in the federal service offered a reassuring explanation of its failure to achieve a more complete success. The trouble lay not in the law itself, but in the fact that a competent and honest staff had never been appointed to enforce it.

The conventional statement of this theory, in this

<sup>14</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 80.*

case made before a committee of Congress in 1926 by an earnest advocate of prohibition, ran as follows:

"As yet, prohibition has not even had a Chinaman's chance. . . . The blame is not on prohibition, but on the political conspiracy that has so largely filled the enforcement positions with crooked and corrupt appointees who were selected to insure that the prohibition law could be violated with impunity for the profit of professional bootleggers and the venal politicians who are their silent, powerful partners."<sup>15</sup>

The moral of this theory, so frequently stated in the early years of prohibition, was that the law must be taken out of the hands of its enemies and put in the hands of its friends. This was clear enough in theory. The problem was how to put the law any more in the hands of its friends than it had been from the very start.

For while the friends of prohibition might feel that Congress interfered too much for the good of the service in the matter of appointments, this was the same Congress whose dry majority was committed to enforcement. "Each year," said Mr. Wayne B. Wheeler in 1926, "the Congress that has been elected has been drier than its predecessor."<sup>16</sup> Meantime, the prohibition commissioners who actually appointed agents of the law, decided questions of administrative policy and set their staffs an example in the matter of personal integrity, were men who had received not only the warm but the enthusiastic endorsement of the prohibition organizations.

Mr. John F. Kramer, the first Commissioner of

<sup>15</sup> Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 1606.

<sup>16</sup> *Ibid.*, p. 868.

Prohibition, was so thoroughly satisfactory to the Anti-Saloon League that after he had taken leave of public office it sent him on a lecture tour.<sup>17</sup> Major Roy A. Haynes, who took command in 1921, was endorsed by Mr. Wheeler as the right man for the office<sup>18</sup> and described in the House of Representatives by Mr. Upshaw of Georgia as an executive of "unsullied integrity" whose "amazing genius and energy" had encouraged every friend of prohibition. "The story of his victories," in Mr. Upshaw's judgment, "reads like a revised edition of the Acts of the Apostles, with *Scottish Chiefs* and the *Arabian Nights* thrown in."<sup>19</sup>

These two administrators of the law, actively in charge of enforcement work for the first five years of prohibition, unquestionably had the confidence of the chief spokesmen of prohibition in Congress and outside of Congress. Unquestionably they did their best to find an honest staff of agents. Mr. Haynes, in fact, insisted not only upon honesty in making appointments to his staff but demanded active sympathy with the whole purpose of the law itself. "No man can do his best work for a cause in which he does not personally have faith," he explained in 1923. "So far, therefore, as it has been possible to man the unit with employees of proved ability and of known adherence to prohibition principles, the force has been built up of men who believe wholeheartedly in the daily tasks they are performing."<sup>20</sup>

Apparently the trouble was that men who believed

<sup>17</sup>*Report of the Senate Committee on Campaign Expenditures, 1926*, p. 1406.

<sup>18</sup>*New York Times*, January 29, 1925.

<sup>19</sup>*Congressional Record*, 67th Congress, 4th Session, p. 1512.

<sup>20</sup>*New York Times*, August 26, 1923.

wholeheartedly in the daily tasks they were performing, when they first entered public office, found it difficult to retain this frame of mind in view of the temptations they were later offered. Such temptations were persistent and beguiling. Mr. Haynes himself reported, in the course of his third year in office, that "there appears to be no limit to the size of the bribe an illegal liquor industry is willing to offer and pay. . . . Millions of dollars piled upon other millions are strewn carelessly across the pathway of those engaged in law enforcement. All or anything that human fancy can devise or desire is offered unhesitatingly. The reverberating chorus of corrupt dollars sounds day and night in the ears of all classes of employees of the enforcement unit."<sup>21</sup>

The clink of these dollars in the ears of a prohibition agent receiving the regulation beginner's salary of \$35 a week may be readily conceived. Vast quantities of alcohol could be diverted from their lawful purpose with the right kind of assistance in Chicago, San Francisco, or New York. Offers of bribes occasionally reached astonishing proportions. Mr. Haynes described one state administrator, on a salary of \$6,000, who estimated "that within a given month's time he could have accumulated at least \$1,000,000."<sup>22</sup> This sum Mr. Haynes described as "higher than the average." Presumably it was very much higher, but it suggested the opportunities latent in the enforcement of the law.

These opportunities being what they were, the essential problem in ridding prohibition of corruption was not the problem of putting the law in the hands of its friends, which had been done on numerous occasions, but in keeping its friends from one year to another.

<sup>21</sup>New York *Times*, July 15, 1923.

<sup>22</sup>*Ibid.*, July 16, 1923.

There were various possibilities. Congress might appropriate salaries large enough to offer a better guarantee against corruption. The public might accept the law wholeheartedly, in which case there would be no market for bootleggers, no profits, and no bribes. A type of enforcement agent might be developed, so loyal to the cause that temptation could not budge him.

The friends of prohibition declined to be discouraged. The law was young. It deserved its day in court. Time was long, and the morals of the Prohibition Bureau would improve with age.

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The question of corruption was unique in one respect. Here, at least, there were certain dependable figures of the federal government concerning dismissals from its own service. To this degree, the extent and character of such corruption in public office as had been introduced by prohibition could be measured without bias. Over most other questions concerned with the social results of this experiment, a sharp dispute had developed by 1925, in which every relevant fact was stubbornly and bitterly contested.

This was true, for example, of the controversy over the effect which prohibition had had upon the evil it was originally designed to cure: the evil of intoxication. A great many sets of figures on this point had come into existence by the end of 1925. The two most widely quoted, by friends of the law on one side and its critics on the other, were those assembled by the World League Against Alcoholism and the Moderation League, Inc. The first set of figures, covering arrests for intoxication in 300 American cities from 1913 to 1923, received the warm endorsement of the Anti-Saloon League and

other prohibition organizations. The second set of figures, covering arrests in 350 cities from 1914 to 1924, was more often quoted by opponents of the law.

In a broad way these two reports agreed upon one fact. During the three years 1918, 1919, and 1920 there had been a steady decrease in arrests for intoxication, compared with earlier years, and therefore a presumptive decrease in intoxication itself. After 1920, both reports agreed that the curve turned up again. How sharply up, however, was a point involved in great dispute.

According to the World League Against Alcoholism, the upturn was not important enough to discredit the results achieved by prohibition. The first four prohibition years from 1920 to 1923 showed an average of 383,711 arrests in the 300 cities on the World League's list, compared with an average of 572,106 arrests in these same cities for the four pre-prohibition years from 1913 to 1916. Taking account of an increase in population, the World League estimated that arrests for drunkenness had decreased by 42.3 per cent as a result of prohibition.<sup>23</sup>

Meantime, according to the Moderation League, which dealt in yearly totals rather than in averages for periods of years, the number of arrests had increased steadily from 226,070 in 1920 to 306,866 in 1921, to 412,640 in 1922, to 483,753 in 1923 and finally to 498,752 in 1924. At this point it was higher than the figure for any preceding year since 1917 and practically back at the pre-prohibition figure of 506,737 for 1914.<sup>24</sup>

There are several reasons which explain the radically different conclusions at which these two reports arrived.

<sup>23</sup>New York Times, November 24, 1924.

<sup>24</sup>Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 354.

For one thing, the authors of the two reports went to a number of different places for their data. In South Dakota, for example, the World League drew its figures from Aberdeen and Lead; the Moderation League, from Sioux Falls, Watertown, and Huron. In Illinois six towns and cities appeared upon both lists; three others only on the list of the World League; and seven others only on the list of the Moderation League. Similar discrepancies occurred in practically all states.

In the second place, the actual figures presented in the two reports disagreed in many instances. There were 45,226 arrests for intoxication in Philadelphia in 1923 according to the World League and 54,124 arrests in the same city in the same year according to the Moderation League. There were 10,643 arrests in New York City and 11,947 in Detroit, according to the first report; 13,141 in New York City and 12,977 in Detroit, according to the second.

In the third place, the comparison between averages in one report and totals in the other was confusing, and in itself the subject of a bitter controversy. Partisans of the World League charged that the figures of the Moderation League were "deceptive and misleading" because they failed to take account of an increase in population.<sup>25</sup> Partisans of the Moderation League charged that the World League had fallen back on averages for four-year periods in order to conceal an alarming recent upturn in the curve.<sup>26</sup>

Added to these differences in method and in content in the two reports themselves, there was a sharp dispute over the interpretation which could properly be

<sup>25</sup>New York Times, December 3, 1925.

<sup>26</sup>Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 355.

placed on any figures for arrests. Friends of prohibition insisted that if 383,711 people in 300 cities were still being arrested for drunkenness in the fourth year of this experiment, it was for one important reason because of increased severity on the part of the police. On this point, as the result of inquiries addressed to various municipal authorities, the World League estimated that nine out of ten offenders were now being arrested for intoxication, as compared with two out of five in the days before the adoption of a national prohibition law.<sup>27</sup>

To the wets, this theory of an aroused police force seemed too hopeful. The police, they argued, had little sympathy with prohibition, as was amply demonstrated by the complaint of the drys that in many cities the existence of speakeasies was regarded with the utmost complacency by mayors and the heads of police departments. If the police would not enforce the law against an illicit industry, they would not be likely to harass the patrons of its trade. Moreover, it seemed to critics of this law that since one result of prohibition had been to increase the production of liquor brewed at home, a great deal of drinking, and a great deal of intoxication, now took place away from the streets and behind closed doors, where there was no occasion for it to appear on the blotters of police departments.

The net result of these contradictory sets of figures, and of the argument which arose over the proper method of interpreting them, was presumably to convince no one who was not prepared to be convinced. People who liked to believe that prohibition was a success

<sup>27</sup>Robert E. Corradini, research secretary of the World League Against Alcoholism, quoted, Irving Fisher, *Prohibition at Its Worst*, p. 32.

despite the handicap of lax enforcement cited the figures of the World League Against Alcoholism, to show that arrests for intoxication, while still in the hundred thousands, had been appreciably reduced. People who preferred to regard the law as a failure cited the figures of the Moderation League to prove that arrests for drunkenness were practically back at their pre-prohibition figure, without taking account of a probable increase of drunkenness in private homes.

There was every opportunity here for anyone interested in the results of prohibition to fortify his personal prejudice with highly documented facts, and plenty of evidence to suggest that individual observers were taking advantage of the opportunity. When a committee of the Senate inquired into conditions existing at the end of 1925, it was able to discover men who could perceive precisely the same set of facts in the same place at the same time in profoundly different lights.

Three instances are typical. By one clergyman the committee was told that in the mining towns of Pennsylvania prohibition had enormously increased drinking and introduced an illicit still "into practically every other home"; by another clergyman from the same section of the country, that drinking was a thing of the past and that in five years of prohibition he had never seen a still.<sup>28</sup>

By an official of the Salvation Army the committee was informed that cases of poverty in New York City as a result of drunkenness were only a fiftieth of what they used to be, and by a judge of the Court of General Sessions, having much to do with these same people,

<sup>28</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 423, 1240.*

that prohibition had multiplied at least by three the menace of drunkenness in the tenement districts of the city.<sup>29</sup>

From a representative of organized labor the committee learned that intemperance among workmen was "constantly increasing," and from an employer of labor that intemperance among workmen was no longer a problem for the manufacturer. "Before prohibition I do not remember ever seeing a milk wagon in our mill-yard. Every morning there are three or four milk wagons there, and the men are using milk in place of beer."<sup>30</sup>

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The same paucity of official data, the same heated dispute over the manner in which these data should be interpreted, and the same striking variations between the first-hand observation of one observer and the next, all characteristic of the controversy over the effect of prohibition on intoxication, were also characteristic of a disagreement over the effect of prohibition on the nation's health.

Into this disagreement voluminous sets of figures were introduced, showing the number of cases of alcoholism, alcoholic poisoning, cirrhosis of the liver, insanity, and drug addiction received from year to year by hospitals in a long list of cities. If such figures showed a tendency to rise, it was frequently the practice of friends of prohibition to dismiss them on the ground that they came from centers of opposition to the law and therefore failed to measure the benefits to be had from strict en-

<sup>29</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, pp. 678, 146.*

<sup>30</sup>*Ibid., pp. 277, 808.*

forcement. If they showed a tendency to fall, the enemies of prohibition argued that they were necessarily local figures, unimportant as an index of conditions existing in many populous industrial cities, where an unpopular law had raised formidable problems.

Meantime, there was little by way of an authentic summary of conditions on a national scale available to partisans on either side. The Census Bureau, it is true, had for some years tabulated deaths from alcoholism in the United States Registration Area. For the seven years from 1911 to 1917 such deaths had been practically stationary at 4.9, 5.3, 5.9, 4.9, 4.4, 5.8, and 5.2 per 100,000 people; for the three years from 1918 to 1920 they had fallen sharply to 2.7, 1.6, and 1.0; in 1921 they had begun to rise, and from that year forward to 1925 they had stood at 1.8, 2.6, 3.2, 3.2, and 3.6 respectively.<sup>31</sup>

In a broad way these figures agreed with the downward curve and then the upward curve in arrests for intoxication reported by both the Moderation League and the World League Against Alcoholism. There was a large element of risk, however, in using these figures as a peg on which to hang broad statements. Deaths from alcoholism played an extremely small part in the mortality figures of the United States, at no time in any of these years, either before or after prohibition, accounting even for the death of one person in every sixteen thousand. A change in such figures might conceivably suggest a tendency, but as an index of the habits of the average American these figures were of little value.

For statisticians interested in exploring the results of prohibition there was more fascination, in these circumstances, in experimenting with figures on a larger

<sup>31</sup>*Mortality Statistics, Bureau of the Census, 1911-1925.*

scale: such figures, for example, as the data of the Census Bureau on public health in general, as reflected in the death rate for all causes. Here there was clear evidence of steady progress over a long period of years. Reports of the Census Bureau for the United States Registration Area showed that in the five years following 1900 the average death rate was 15.9 per thousand people; that in the five years before the entrance of the United States into the World War the figure had dropped to 14.6; and that in the first five years of prohibition it had dropped again to 12.7.<sup>32</sup>

The question at issue was whether prohibition had played any part in the lowering of the death rate in these last five years. Partisans of the law claimed that it had, and if they were devout enough in their partisanship claimed on behalf of prohibition entire credit for the reduction. Thus Mr. Wheeler declared in 1924 that "the saving of human life since prohibition reduced the death rate is equivalent to a million lives."<sup>33</sup>

To critics of the law this seemed too large a count. Various things had been happening in these five years, they insisted, aside from an experiment with prohibition. Medical science had improved, hospital methods had improved, new serums and new vaccines had been discovered, schools and insurance companies had initiated health campaigns, the standards of public hygiene were steadily advancing. If prohibition was responsible for lowering the death rate in the United States, critics of the law asked why the death rate had also fallen in these years in many European nations which still permitted the use of intoxicating liquors.

<sup>32</sup>*Mortality Statistics, Bureau of the Census, 1901-1905, 1912-1916, 1920-1924.*

<sup>33</sup>*New York Times*, November 27, 1924.

Argument was based on faith. There were people who felt in 1925 that prohibition was entirely responsible for any gain in public health, people who felt that it could fairly claim some portion of the credit, people who felt that it had played no part whatever, and people who felt that its effect had been definitely harmful, slowing down progress which would have been more rapid if a large quantity of impure and poisonous liquor had not flooded the country in the years from 1920 to 1925.

There was no way in which any of these people could establish indisputable proof of their theories on the basis of existing data.

§

The claims of rival prophets, the conflict between hostile theories and the will to believe what each observer wished to believe, all reached their climax in the dispute over two final points widely debated in these years: namely, the question of what effect, if any, prohibition had had upon crime in the United States, and the question of what effect, if any, it had had upon the prosperity which the country began to enjoy in increasing measure after its first post-war depression.

As might have been anticipated, the range of these two questions was sufficiently wide to open the door to sweeping statements made with great finality. Since crime and prosperity were even more complex in their causes than public health and arrests for intoxication, more difficult to measure accurately and more difficult to understand, it was correspondingly easy to be apostolic about them. On frequent occasions statesmen on both sides of this dispute confused hypothesis with fact and snap judgment with profound and sober research.

The conclusions reached by this procedure could be many miles apart. In the matter of crime, for instance, it seemed clear to Mr. Hudson Maxim that prohibition had suddenly "changed the law-abiding American people into the most lawless people in the world" and "filled our prisons with lawbreakers till the doors bulge."<sup>34</sup> To Mr. Wheeler, on the other hand, it seemed no less clear that crime in a prohibition country had almost ceased to be a problem. "The crime rate has so decreased that many jails are closed. Others are sold. Our penal population is below the average of license years."<sup>35</sup>

On the whole, what data were available concerning crimes of a serious character lent themselves to more effective use by critics of the law than by its friends. In the opinion of the Census Bureau the most reliable figures concerning prison population were those showing admittance to penal institutions following sentence in the courts.<sup>36</sup> In this respect the census figures showed a decided increase in the number of prisoners admitted to federal and state prisons and reformatories over a period of sixteen years. In 1910 the number of such prisoners was 32.3 per 100,000 people; by 1923 it had increased to 34.6; by 1926 it had again increased to 41.8.<sup>37</sup>

The question at this point was whether prohibition had or had not played an important part in this increase. To many critics of the law the case seemed clear enough.

<sup>34</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session*, p. 173.

<sup>35</sup>*New York Times*, November 27, 1924.

<sup>36</sup>*Prisoners in State and Federal Prisons and Reformatories, 1926*, Bureau of the Census, 1929, p. 5.

<sup>37</sup>*Ibid.*, p. 7.

Prohibition had fostered an illicit traffic. It had hung up enormous prizes for such gangs as infested many of the larger cities. It had diverted the attention of at least some part of the police from the prevention of crimes like burglary and homicide to a pursuit of illicit pints of liquor. By persuading otherwise law-abiding citizens to set an example of lawlessness with respect to this one law, it had fostered lawlessness in general.

To these arguments the friends of prohibition took exception. By no reasonable process of deduction, they insisted, could such crimes as burglary and homicide be traced to prohibition. Crimes of this sort had their origin in other sources, entirely independent of federal control of intoxicating liquor. Some increase in serious crime had usually followed in the train of war. This had been true in other countries in the present case. "It is quite possible," the Federal Council of Churches suggested in 1925, "that the effect of prohibition is really shown in the retardation of the post-war crime reaction."<sup>38</sup>

Meantime, while commitments to federal and state prisons were increasing, so were bank deposits, wages, corporation profits, real estate values, the assets of building and loan associations, the production figures of American factories, and the prices of common stocks.

It is characteristic of the whole argument over the social effects of prohibition that immediately the position of the two factions was reversed. It was now the wets who insisted that it was wholly unfair to drag prohibition into the argument as an explanation of prosperity, and the drys who discovered here clear

<sup>38</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 378.*

proof of cause-and-effect which they had been unable to find in the case of prohibition and the prisons.

On both sides the argument was familiar.

To the wets it seemed certain that prosperity was the result of influences wholly remote from prohibition. In support of this contention they pointed out that most of the large cities, where prohibition was unpopular and unsuccessfully enforced, were at this time enjoying unusual prosperity, with high wages and rising values, whereas the rural sections of the country, which favored the law and more nearly observed it, were bitterly complaining of hard times, insisting that farm values had depreciated to the extent of fifteen or twenty billion dollars and demanding prompt relief from Congress.

To the drys the plight of the farmer was a political affair, but the prosperity of the towns was the clear result of six years of prohibition. This new law had fostered sober habits. It had therefore promoted efficiency in industry and set new standards of production. It had saved for more useful purposes the vast sums of money which had been spent for liquor in the days before the war and diverted this money to the building of homes, the purchase of bonds, and the acquisition of radios and motor cars.

On this theory of prohibition as the guiding genius of prosperity, the drys erected a superstructure of claims which were fully as broad and as sweeping as the contrary claims of those wets who indicted prohibition as the sole cause of a crime wave which had filled the prisons till their doors burst.

To Mr. Wheeler it seemed clear that prohibition was primarily responsible for the gain in bank deposits, the issuance of an increasingly large number of life insurance policies and the vigor of the building boom which had

appeared in 1924.<sup>39</sup> Prohibition had eliminated "pauperism and the slums that clustered around their creator, the saloon."<sup>40</sup> It was the principal factor in financing "vast expenditures on moving pictures, athletic equipment, and other wholesome entertainment," in sending "throngs of youths and girls to high school and college by eliminating the liquor drain on the family purse," and in "making roads safer for the four million automobiles manufactured last year, many of which were bought by former impoverished drinkers."<sup>41</sup>

These views were shared in other quarters.

Mr. Irving Fisher submitted figures to a committee of Congress in 1926 to support the claim that prohibition now added to the income of the United States six billion dollars a year, "without counting any savings in the cost of jails, almshouses, asylums, etc., or any economic savings from reducing the death rate."<sup>42</sup>

The World League Against Alcoholism estimated that since arrests for intoxication had been reduced by 42.3 per cent as a result of prohibition, and since each arrest cost \$94 on the average, the country now saved nearly a hundred million dollars annually in this one item.<sup>43</sup>

Major Haynes found in the Eighteenth Amendment the fundamental explanation of America's position as creditor of a "drink-fettered Europe" and declared that prohibition had introduced a new régime in in-

<sup>39</sup>*New York Times*, November 27, 1924.

<sup>40</sup>*Ibid.*, January 16, 1926.

<sup>41</sup>*Ibid.*, December 25, 1923.

<sup>42</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 1022.

<sup>43</sup>*New York Times*, November 24, 1924.

dustry: "We are the only nation in the world without an unemployment problem."<sup>44</sup>

The proprietor of two thriving hairdressing shops in Washington was quoted in the press as saying: "It is very easy to trace the growth of the beauty parlor business to prohibition. When men drank, they were not so critical. Their wives and sweethearts looked attractive to them without the assistance of beauty parlors. Now, however, men remain clear-eyed all evening and notice wrinkles, pallor, straight hair and unsparkling eyes. As a result, the women are flocking to beauty parlors and we have to turn many away every day."<sup>45</sup>

At this point, it merely remained for some economist with a set of charts and a talent for round numbers to compute how many million or billion dollars a renaissance in the cosmetic trade had put in the pockets of a sober nation.

§

The fact of the matter is, that while anyone could believe what he wished to believe, and find ample evidence to uphold his convictions after he had reached them, a large part of the argument over the effect of prohibition on both prosperity and crime was not susceptible of proof. It was possible to feel deeply that prohibition must inevitably be an important factor in such questions; it was possible to demonstrate with towering sets of figures that this or that had happened to bank deposits or to building loans or to jail admissions, over one period of years as compared with another period of years; but to trace the precise responsibility from columns of figures back to prohibi-

<sup>44</sup>New York *Times*, August 11, 1923.

<sup>45</sup>*Ibid.*, April 13, 1922.

tion, as a cause, was a procedure which did not lend itself to a scientific method when it was applied indiscriminately to thousands of individual cases as if they were all alike.

Even in the individual case itself, it was difficult to get back to single concrete causes in matters as complex and as involved as prosperity and crime. Psychologists might study for a year the record of a young criminal committed to prison by the courts and still feel uncertain, if they were good enough psychologists, precisely how much influence they could properly attach to pre-natal influence, to physical equipment, to inherited traits, to early environment, to later associations, to immediate temptation or to a variety of other factors which had little to do with intoxicating liquor or the Volstead Act.

If any one of these psychologists had suddenly announced that here was a case in which pre-natal influence did not matter, physical equipment did not matter, early training did not matter, environment did not matter, and nothing mattered save the fact that the United States now had a prohibition law, his colleagues would have laughed at him. Yet it was precisely without regard to the complex pattern of influences at work in the individual case that prohibition was denounced as the exclusive source of a new crime wave. It was precisely without regard to the complex pattern of such economic factors as the availability of ample credit, the increasing use of electrical power, the progress of mechanical science, the existence of a sound banking system, the purchasing power of other countries, and the maintenance on a world scale of a satisfactory balance between production and consumption, that prohibition was acclaimed as the fountainhead of all prosperity.

The difficulty in arriving at indisputable conclusions about prohibition as a social and industrial influence lay deep down. Not only had such questions failed to receive more than passing notice from the great research societies and the scientific foundations which might have studied them with profit; not only did most of the fodder for this controversy come from partisan organizations which were concerned with the pleading of a special case and therefore not immune from self-deception; in addition, there were certain far-reaching questions concerning the results of prohibition which no amount of disinterested and expert research could have answered mathematically in 1925, with any equipment which science had yet made available for the measurement of men and institutions in the mass.

This fact, however, did not deter champions on either side from rushing into print with bulletins announcing ultimate conclusions. Year by year the controversy broadened. Year by year it increased in vigor and intensity as new claims were made, new documents piled up, new challenges rang out, and new figures were scattered broadcast in an effort to capture the loyalty of a public which surveyed the results of this experiment from profoundly different points of view and with some evidence of an increasing bitterness of feeling.

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## CHAPTER VIII

### The Deadlock of 1926

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ONE result of the policy pursued by the federal government down to the end of 1925 was to restore at least in part the old days of local option. Since Congress had created no machinery capable of enforcing the law systematically and even-handedly throughout the country, each community was thrown back on its own resources. It could not choose what type of legislation it would have, but it could choose how much it would enforce the legislation which had been given it. Kansas had one standard. Georgia a second. Downstate New York a third. Upstate New York a fourth. Other parts of other states had other standards. Those communities which liked the law enforced it. Those communities which did not like the law enforced it only to a point consistent with the prevailing mood of local sentiment.

Whatever value was to be set upon the results of this experiment—whether it had fostered crime or prevented crime, whether it had ruined the farmer by shutting off one market for his grain or added billions of dollars to the income of the nation—it was clear by 1926 that new methods of enforcement must be tried if the government wished to put an end to an illicit liquor traffic in all sections of the country.

Drives had failed to solve the problems of the

Prohibition Bureau. Sporadic raids had proved to be no substitute for steady pressure. Episodes like General Butler's march through Philadelphia had ended in a discovery that not very much had happened. The power of the courts to enforce the law was crippled by their lack of real authority. If they attempted to impose jail sentences, on the theory that only jail sentences would prevent frequent violations of the law, they found themselves confronted by more cases involving jury trials than they could handle. If they attempted to keep their dockets clear they were compelled to resort to light fines on bargain days and the restoration of a license system.

The stage was set in 1926 for a bolder and more powerful effort to enforce the law than any effort which the country had yet witnessed. Every detail of the existing situation pointed in this direction. The first investigation made by a committee of Congress into the progress of enforcement had disclosed the failure of the government to control important sources of production.<sup>1</sup> The estimate of General Andrews that his bureau had not been able to seize more than one tenth of the stills in operation or more than one twentieth of the liquor run across the border had been broadcast by the daily press. The Department of Justice was insisting that "additional judges and increased office help for United States attorneys are absolutely necessary."<sup>2</sup> The militant prohibition organizations themselves were vigorously complaining of a lack of effective effort: their protests ranging from Mr. Wheeler's crit-

<sup>1</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session.* Cf. Chapter V, *supra*.

<sup>2</sup>*Report of the Attorney General of the United States*, fiscal year ended June 30, 1925, p. 39.

icism on the score of industrial alcohol to the complaint of the United Committee for Law Enforcement that the law had never been enforced "beyond the point where, in the opinion of the enforcers, it would hurt the party in power by enforcing it."<sup>3</sup>

The one logical alternative to a great effort to create more machinery of law enforcement in 1926 was to reduce the amount of law to be enforced. This was only a theoretical alternative. A dry majority was in complete control of Congress. It took its cue from the leaders of the prohibition movement. Enforcement might be difficult, but in the opinion of these leaders this was the last reason in the world to change the law.

"The very fact that the law is difficult to enforce," said Mr. Wheeler in April, 1926, "is the clearest proof of the need of its existence."<sup>4</sup>

With such a slogan there could be no course but forward.

## §

The program of enforcement placed before Congress and the country on behalf of the Prohibition Bureau in 1926 was a far-reaching program, though it failed to come to grips with the central problem of an adequate supply of men and money. This was, and always had been, an embarrassing question: embarrassing to an Administration which was making its reputation on a record of economy, embarrassing to prohibition leaders who did not like to see the cost of enforcement pushed

<sup>3</sup>Chapter VI, *supra*.

<sup>4</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 1626.

too high, embarrassing to a Congress reluctant to tax the public heavily for enforcement of a law concerning which there existed a wide difference of opinion, embarrassing to a public which at no time liked to pay more taxes for any purpose than it had to.

General Andrews gave the House Judiciary Committee an idea of the responsibilities involved in a realistic effort to enforce the law, when he testified that on the basis of his experience it would require an army of from 12,000 to 15,000 men to handle the comparatively minor problem of preventing smuggling on the border.<sup>5</sup> Needless to say, the House Judiciary Committee did not think it necessary to refer again to this phase of the matter. General Andrews himself asked only for a modest increase of \$3,000,000 in the budget of his bureau, to cover all his problems.<sup>6</sup>

Nevertheless, though it skirted the question of appropriations, General Andrews's program was by all odds the most ambitious program of enforcement submitted to Congress by an official of the federal government in the first six years of prohibition. For all five of the major sources of production which had flourished despite the best efforts of the Prohibition Bureau, General Andrews recommended the adoption of legislation giving the government new authority.

He urged that the control of the Prohibition Bureau over the distribution of medicinal liquor be broadened.<sup>7</sup> He proposed that all manufacturers of cereal beverages be required to take out a federal permit, give bond, and subject their plants to federal inspection.<sup>8</sup> He asked for

<sup>5</sup>New York Times, April 13, 1926.

<sup>6</sup>Ibid., April 17, 1926.

<sup>7</sup>Ibid., April 3, 1926.

<sup>8</sup>Ibid.

power to search American ships beyond the twelve-mile limit, power to confiscate vessels captured by the government, and power to negotiate new agreements with foreign countries, in an effort to reduce smuggling by sea and along the borders.<sup>9</sup> He proposed that Congress permit the Prohibition Bureau to confiscate such industrial alcohol "as does not substantially comply with the formula under which it is authorized to be manufactured."<sup>10</sup> He asked for power to search private dwellings to discover illicit stills, not only on warrants charging sale, as provided in the Volstead Act, but also on suspicion of manufacture for commercial purposes.<sup>11</sup>

It was important to make this last change, in General Andrews's opinion, because "the liquor traffic operators have taken advantage of the protection afforded private dwellings, from entry by search warrants, to use them as distilleries. They rent these dwellings and establish a family whose occupation is to distill alcohol for the bootleg trade. They instruct them never, under any circumstances, to sell any liquor on the premises."<sup>12</sup> In these circumstances the government was powerless to interfere. It must have more authority.

If the grant of this authority involved a risk that law-abiding homes would be invaded by raiding parties whose suspicions turned out to have been ill founded, that risk must be accepted.

"I cannot impress you too much," said General Andrews to a committee of the Senate, "with my feeling of the necessity that Congress shall give us

<sup>9</sup>New York *Times*, April 20, 1926.

<sup>10</sup>*Ibid.*, April 3, 1926.

<sup>11</sup>*Ibid.*, April 3, May 8, 1926.

<sup>12</sup>*Ibid.*, April 3, 1926.

these laws and this assistance and an opportunity to show what can be done.”<sup>13</sup>

## §

Accompanied by various briefs and a sheaf of memoranda, General Andrews’s program was submitted to Congress in April, 1926. This Congress, elected in 1924, had been described by Mr. Wheeler as the dryest Congress on record, “surpassing its predecessors in the majority to sustain and enforce constitutional prohibition.”<sup>14</sup> According to Mr. Wheeler’s data, there were 72 drys in the Senate against 24 wets, 319 known friends of the law in the House against 105 opponents.<sup>15</sup> In both cases the majority was practically three to one. If Mr. Wheeler’s figures were correct, the friends of prohibition had ample power to force the immediate adoption of General Andrews’s legislation in the House and to invoke cloture in the Senate in case of a filibuster.

What followed was another demonstration of the lack of interest which a dry Congress could display in a dry program. Though General Andrews appeared before one committee of Congress or another on eight different occasions in the month of April to urge the adoption of his bills,<sup>16</sup> though he declared that the Prohibition Bureau would be seriously handicapped by the failure of this legislation,<sup>17</sup> and though his efforts to obtain action

<sup>13</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 1434.*

<sup>14</sup>*New York Times*, November 27, 1924.

<sup>15</sup>*Ibid.*, November 7, 1924.

<sup>16</sup>House Judiciary Committee, April 12 and 19, 1926; subcommittee of the Senate Judiciary Committee, April 5, 6, 14, 15, 23, and 24, 1926.

<sup>17</sup>*New York Times*, April 27, 1926.

were reinforced by pleas from the Methodist Board of Temperance and other prohibition organizations,<sup>18</sup> not one of the bills designed to give the government new power to deal with the sources of illicit liquor was adopted by the Congress to which it was submitted with a plea for urgent action.

The House gave its approval to a bill separating the Prohibition Bureau from the office of the Commissioner of Internal Revenue and finally bringing the enforcement staff under civil service regulations.<sup>19</sup> It voted a million dollars with which to begin work on nine new cutters for the Coast Guard and increased the appropriation of the Prohibition Bureau by \$2,322,445.<sup>20</sup> The ambitious bills which were to give the government new authority to deal with the major sources of production were put aside. First the Judiciary Committee of the Senate whittled away some of their more ambitious sections;<sup>21</sup> then the leaders of the House decided that since the Senate was plainly in no mood for action and since 1926 was an election year, it would be a stroke of statesmanship to let the whole affair go over.<sup>22</sup>

Six months later, when this same Congress reassembled for its final session, General Andrews confessed in an address before the Woman's Christian Temperance Union that his program for a new era in the Prohibition Bureau was "not progressing any too happily" and that he had "not encountered any undue eagerness on the part of Congress to get behind law enforce-

<sup>18</sup>*New York Times*, May 10, 1926.

<sup>19</sup>H. R. 10729, 69th Congress, 1st Session.

<sup>20</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 2.

<sup>21</sup>*New York Times*, May 8 and 15, 1926.

<sup>22</sup>*Ibid.*, June 11, 1926.

ment."<sup>23</sup> The Senate managed on this occasion to adopt the bill bringing the Prohibition Bureau under civil service regulations, but the bills that were to deal with the unflagging sources of production perished.

Four months after the adjournment of Congress it was discovered that not even the bill to establish civil service regulations could be effective for some time, since Congress had failed to appropriate funds for its enforcement.<sup>24</sup>

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If the collapse of the Andrews program took place quietly and unostentatiously, another bold hope gently laid to rest as public interest petered out, it was for one reason because certain new and challenging issues had suddenly thrust themselves into the controversy over prohibition and captured the attention of both Congress and the country.

The first of these issues had its source in an unexpected order issued from the White House in May, 1926, within a month of the time when the Andrews program was first placed in the hands of Congress. This order was signed by Mr. Coolidge. In a brief paragraph it authorized the appointment of "any state, county or municipal officer . . . at a nominal rate of compensation, as a prohibition officer of the Treasury Department," except in cases where such appointment was specifically forbidden by local statute. The purpose of giving federal authority to local officers, the President explained, was "in order that they may more efficiently

<sup>23</sup>Associated Press dispatch, Washington, January 25, 1927.

<sup>24</sup>*Ibid.*, Washington, July 16, 1927.

function in the enforcement of the National Prohibition Act.”<sup>25</sup>

The storm of protest which this order aroused was as sudden as the appearance of the order itself and as violent as any protest which six years of prohibition had developed. Journals as staunch in their support of the Coolidge Administration as the New York *Herald Tribune* described the order as “confusing and dangerous,” running counter “to the whole trend of Mr. Coolidge’s governmental philosophy, which has stressed the importance of state government and the necessity of respecting its integrity.”<sup>26</sup> The New York *Times* could find no explanation of the order save that someone in the Prohibition Bureau had suggested it “and Mr. Coolidge, in the pressure of duties and campaigns, must have signed mechanically.”<sup>27</sup> A careful student of governmental procedure in the United States, Senator Beveridge of Indiana, insisted that in this case the Administration had embarked upon a policy “which, if it succeeds, will radically and fundamentally change our form of government and change it at once.”<sup>28</sup>

Identifying General Andrews as the author of this policy, Senator Beveridge said: “The former officer of our regular army who devised this change in the American system and who is in charge of it tells us the constitutional pretext for it. He says that the hitherto exclusive police power of the states is now shared by the central government. If this military and bureaucratic exposition of constitutional law is sound, then the plan-

<sup>25</sup>New York *Times*, May 22, 1926.

<sup>26</sup>New York *Herald Tribune*, May 23, 1926.

<sup>27</sup>New York *Times*, May 24, 1926.

<sup>28</sup>Address before the Historical Society of Pennsylvania, Associated Press dispatch, Philadelphia, June 2, 1926.

ners and builders of American institutions wrought in vain. It is obvious that if local officers can be made national officers to execute one national law in a particular locality they can be made agents of a general and centralized government to enforce other laws in every locality.”<sup>29</sup>

For two weeks Congress, the press, and presumably a large part of the public debated this new issue with interest and intensity. Hot words were exchanged in Congress. Various explanations were offered by the executive departments to clarify the issue. On Mr. Coolidge’s behalf it was pointed out that he could scarcely have wished to attack states’ rights when he had just made a speech defending them, saying, no longer ago than the previous Saturday, that “the states should not be induced by coercion or by favor to surrender the management of their own affairs.”<sup>30</sup> On General Andrews’s behalf it was explained that the executive order had been “asked for merely to meet a situation in California where some deputy sheriffs had volunteered to police rural precincts in coöperation with the federal forces.”<sup>31</sup> On behalf of the Department of Justice it was explained that while the Attorney General had not studied the order before it was issued he had studied it afterward and was convinced that it was proper.<sup>32</sup>

In the end, after two weeks of angry debate in Congress and the firm statement of the Official Spokesman of the White House that the President would not yield under fire but intended to stand his ground,<sup>33</sup> the con-

<sup>29</sup>Address before the Historical Society of Pennsylvania, Associated Press dispatch, Philadelphia, June 2, 1926.

<sup>30</sup>Address at Williamstown, Va., May 15, 1926.

<sup>31</sup>New York Times, May 25, 1926.

<sup>32</sup>Ibid.

<sup>33</sup>Ibid.

stitutionality of his action was upheld by a vote of 4 to 1 in the Judiciary Committee of the Senate and a vote of 8 to 7 in the Judiciary Committee of the House.<sup>34</sup>

This much having been established by the votes of two committees, and the President having carried his point with Congress, nothing more was heard about the matter. No state officials were appointed as agents of the federal government. No state officials were recommended for appointment. No change was made in the enforcement of the law. Mr. Coolidge's order was filed away as No. 4439, and the whole question was forgotten.

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Scarcely had the echo of this controversy died away, however, before a new issue appeared, capable of arousing a still more vigorous disagreement over the methods which could properly be employed by the federal government in its effort to enforce the law. This issue turned upon the propriety of the government's under-cover work and particularly its use of the *agent provocateur*.

It was inherent in the problem of enforcement that the law could not be invoked without a certain amount of subterfuge on the part of the government's agents. As the Assistant Commissioner of the Prohibition Bureau explained to a committee of Congress on one occasion, purchase of evidence was an indispensable part of the administration of the law. "That is about the only way, Mr. Chairman, that our agents have of making cases that will stick in court. They cannot convict on hearsay, and a person who buys from a bootlegger will not testify in court against the bootlegger, because that would cut off his source of supply. So it is necessary

<sup>34</sup>New York *Times*, June 8 and 11, 1926.

for agents to make the purchase, and they can testify in court that they personally have made the purchase, in that way getting evidence on which a conviction may be had.”<sup>35</sup>

It was difficult to quarrel with this argument without quarrelling with prohibition. Plainly, if the government wished to enforce the law, it must in many cases first tempt people to break the law, in order to have clear proof of their guilt when it arrested them.

There were various ways, however, of achieving this result. On certain occasions even the friends of prohibition had found fault with the methods employed by overzealous officials in their effort to elicit information which could be used in court. In one case the Controller General had been forced to overrule the claim of a prohibition agent who included in his expense account the item of \$50 lost in a poker game incurred in the line of duty.<sup>36</sup> On another occasion considerable excitement was aroused in Congress over the disclosure that \$279 worth of suprême of cantaloupe au porte, breast of chicken Florentine, asparagus Hollandaise, and bonne fraises au sole had been purchased for a single dinner at the Hotel Mayflower in Washington by two agents of the government entertaining a party of suspected lawbreakers.<sup>37</sup>

It was the case of the Bridge Whist Club, however, which brought criticism of the government’s undercover work to a head and precipitated another controversy in Congress, shortly after Mr. Coolidge’s executive order concerning state and local officials had ceased to be a problem. Somewhat casually, in the course of a

<sup>35</sup>*Congressional Record*, 68th Congress, 2d Session, p. 961.

<sup>36</sup>Associated Press dispatch, Washington, May 9, 1925.

<sup>37</sup>*New York Times*, December 19, 1925.

lawsuit brought to break a leasehold, it was discovered that agents of the federal government had rented premises at 14 East 44th Street in New York City, established a popular speakeasy at this address, and sold liquor freely to all customers over a period of six months between November 1, 1925, and May 1, 1926.<sup>38</sup>

These facts were corroborated by the Treasury Department, following their disclosure in New York, and defended on the ground that the Bridge Whist Club had served as an important source of information concerning the activity of liquor smugglers.<sup>39</sup> To the dry majority of Congress this statement of the case was satisfactory, but to the wet minority it seemed to carry warning of a dangerous precedent.

Two other cases of somewhat similar activity on the part of the federal government were discovered: one involving coöperation in the management of an enterprising poolroom-bar in Norfolk, Virginia; the other, a plan to transport liquor across the Canadian border in northern New York and dispose of this liquor to bootleggers who would then be raided.<sup>40</sup> All three of these cases seemed, to the minority in Congress, to lead the government along a strange new path which it could not pursue with honor, to involve it in flagrant treachery, and to threaten the private citizen with a system of entrapment which he would find intolerable.

For the better part of three months the debate ran on, with a succession of statements issued by the Treasury Department and a fresh dispute reaching new heights of bitterness in Congress. As in the case of Mr. Coolidge's executive order, the upshot was irresolution.

<sup>38</sup>*New York Times*, December 21, 1926; January 27, 1927.

<sup>39</sup>*Senate Document No. 198*, 69th Congress, 2d Session.

<sup>40</sup>*Ibid.*

The Treasury Department insisted that violations of the law were "nationwide in their occurrence and almost without number"; that "no parallel of this situation exists in normal times—it is similar, rather, to war"; and that "without the employment of under-cover methods and the willingness of government servants to become identified with the law violators in order to unearth their secrets, prohibition enforcement will be handicapped almost to the point of failure."<sup>41</sup>

Simultaneously, however, the Treasury agreed that its agents ought not to "engage in any illegal practices or entice others to do so" and confessed that it found espionage unpleasant business. "No one likes the idea," said the Treasury. Unfortunately, "it is as essential here as it is in war in order to gain necessary intelligence."<sup>42</sup>

The conclusion seemed to be that the experiment with the Bridge Whist Club and the Norfolk poolroom had been efficacious but distasteful.

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There was one other question of a new and highly controversial character which thrust itself into the foreground of public interest at this time, during the year which elapsed between the appearance and the disappearance of General Andrews's program of emergency legislation. The Christmas holidays of 1926 had been marked by an unusually large number of deaths from alcoholism or alcoholic poisoning, and "poison alcohol" leapt suddenly and sensationaly into the headlines of the daily papers.

<sup>41</sup>*Senate Document No. 198, 69th Congress, 2d Session, part 2,*  
pp. 1-2.

<sup>42</sup>*Ibid., part 2, p. 2.*

To many critics of the Volstead Act it seemed, in fact, that the time had come to charge the federal government with direct responsibility for these deaths and to accuse it of the callous and brutal murder of its own citizens. The federal government insisted upon doctoring industrial alcohol with deadly poisons. On the authority of the Assistant Secretary of the Treasury, enough industrial alcohol had been diverted into the hands of bootleggers in 1925 to manufacture 150,000,000 quarts of liquor.<sup>43</sup> The government knew this to be true and yet continued to order the use of poisonous denaturants: in fact, precisely at this time had ordered that the quantity of wood alcohol used in one of its commonest formulas be doubled.<sup>44</sup> By what logic, asked the opponents of prohibition, could such action be defended? Senator Edge denounced the government's policy as "fiendish."<sup>45</sup> Representative Cellar compared it with the methods of Lucrezia Borgia.<sup>46</sup> The New York State Legislature adopted a resolution demanding that Congress prohibit by law the use of poisonous denaturants.<sup>47</sup>

To such criticism as this the government had certain ready answers.

In the first place, it suggested that deaths attributed to wood alcohol could more properly be attributed in many instances merely to heavy drinking. In support of this theory it cited a letter from the Health Commissioner of New York, concerning casualties in that city, in which this official stated: "We do not know how many of these deaths were due to acute alcoholic poisoning

<sup>43</sup>Chapter V, *supra*.

<sup>44</sup>Treasury Department order 3929, approved October 8, 1926.

<sup>45</sup>New York Times, January 3, 1927.

<sup>46</sup>Ibid., January 4, 1927.

<sup>47</sup>Ibid., March 3, 1927.

and how many were the result of chronic indulgence in alcohol.”<sup>48</sup>

In the second place, the Government insisted that its policy of using denaturants of a deadly character was not dictated by a sudden desire to enforce the Volstead Act more vigorously, but by a policy dating back to 1906, when Congress had adopted a law designed to aid American industry by making denatured alcohol tax-free for industrial purposes. On this occasion Congress had required that “wood alcohol or other suitable ingredient” be added to this alcohol, in order to keep it from competing with beverage alcohol on which a tax was placed. Half of the formulas in use by 1926 predated prohibition.

In the third place, granting that people had not been in the habit of drinking industrial alcohol in the days before prohibition and that this phase of the matter had become a problem only after 1920, the fact remained that the Volstead Act also required the use of effective denaturants and that no satisfactory substitute for wood alcohol had been discovered. As the chief chemist of the Prohibition Bureau pointed out: “Being closely related chemically to ethyl alcohol, having a boiling point only slightly below that of ethyl alcohol, and having physical properties closely resembling ethyl alcohol, it is a substance that cannot easily be removed.”<sup>49</sup>

Finally, it was the Government’s theory that doubling the quantity of wood alcohol would actually protect the very substantial part of the public which persisted in drinking illegal liquor. “Under the new formula there will be less chance of poisoning than heretofore,” insisted General Andrews. “A strong trace of wood al-

<sup>48</sup>Senate Document No. 195, p. 137, 69th Congress, 2d Session.

<sup>49</sup>Ibid., p. 135.

cohol is so offensive that it will warn the most reckless drinker.”<sup>50</sup>

On this point there was some difference of opinion. Dr. James M. Doran, as chief chemist of General Andrews's bureau, agreed at this time that wood alcohol carried “distinctive odorous substances commonly designated as pyroligneous compounds that, by their characteristic odor and taste, at once disclose to the individual the patent fact that the mixture or liquid is unfit for consumption.”<sup>51</sup> In 1923, however, when the problem of the Prohibition Bureau had not been a defense of the government against charges of using poisons but a question of helping enforce the law by alarming people into obeying it, Dr. Doran was quoted in the press as saying: “It is impossible to detect wood alcohol except by a thorough chemical analysis performed by a skilled chemist in a well-equipped laboratory.”<sup>52</sup>

In any case, this policy was mandatory. The Volstead Act required the use of ingredients which could not be removed. Wood alcohol was the best of these ingredients. If the law was wrong, it was the business of Congress to change it. The Prohibition Bureau itself stood on the theory that drinking in a post-Volstead era was too dangerous to be risked but not dangerous enough to point an accusing finger at the government.

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If there was some hesitancy here, and little enthusiasm for drastic methods merely because they were

<sup>50</sup>*New York Times*, January 9, 1927.

<sup>51</sup>*Senate Document, No. 195*, p. 135, 69th Congress, 2d Session.

<sup>52</sup>*New York Times*, July 26, 1923.

drastic, it was not for lack of encouraging support on the part of the prohibition organizations. At every stage of the controversy which had run on through these years, the prohibition organizations had done their best to uphold the hand of the government and to stiffen its resolution.

The President's executive order concerning the federalization of local officials had been endorsed by the General Assembly of the United Presbyterian Church as sound governmental policy.<sup>53</sup> The Anti-Saloon League had thrown itself into the controversy over the Bridge Whist Club and demanded that Congress retain in the budget of the Prohibition Bureau an appropriation for the employment of under-cover agents.<sup>54</sup> Mr. Wheeler had defended the use of wood alcohol and insisted that "the government is under no obligation to furnish people with alcohol that is drinkable when the Constitution prohibits it; the person who drinks this industrial alcohol is a deliberate suicide."<sup>55</sup> The Philadelphia branch of the Woman's Christian Temperance Union adopted a resolution denouncing as "modification of the Volstead Act" the proposal to substitute obnoxious but harmless ingredients.<sup>56</sup> Mr. Atticus Webb, superintendent of the Anti-Saloon League of Texas, sent a telegram to Secretary Mellon insisting on the use of lethal poisons on the ground that "it is not the function of the Treasury to make it safe to heap contempt upon the Constitution."<sup>57</sup>

Nevertheless, though the government had had this prompt and vigorous support from many of the most

<sup>53</sup>*New York Times*, June 1, 1926.

<sup>54</sup>*Ibid.*, December 20, 1926.

<sup>55</sup>*Ibid.*, December 30, 1926.

<sup>56</sup>*Ibid.*, January 4, 1927.

<sup>57</sup>*Senate Document*, No. 195, p. 136, 69th Congress, 2d Session.

ardent friends of prohibition, it had shown a certain amount of diffidence and irresolution.

The executive order authorizing federal status for state and municipal officers had been launched on the theory that it would substantially improve the enforcement of the law, yet no state or municipal officers had been appointed to federal positions. The Bridge Whist Club had been described by the Secretary of the Treasury as an "exceedingly fruitful" venture,<sup>58</sup> leading to the discovery of information of great value, yet the government had decided to have no more whist clubs. Wood alcohol was defended by the chief chemist of the Prohibition Bureau as the most effective denaturant which the government could use, since it was the most difficult denaturant to remove, yet the government had used it sparingly until the end of 1926 and then merely substituted 4 per cent for 2 per cent.

There were signs here of reluctance to pursue apparently logical theories to their ultimate conclusions. Particularly in the matter of federal appointments for state officers, the government's hesitancy raised certain questions of special interest and importance.

## §

Whatever the legal and moral responsibilities of the states under the Eighteenth Amendment, and this question was to be debated with increasing vigor as time passed, it was clear by 1926 that the states had not given the federal government the effective support which the authors of the "concurrent" clause had hopefully anticipated.

<sup>58</sup>*Senate Document, No. 198, p. 1, 69th Congress, 2d Session.*

It is true, of course, that an immense amount of legislation had been written on the statute books at the state capitals. By the end of the first year of prohibition thirty-eight states had adopted legislation to supplement the Volstead Act and by the end of the second year only a few states remained without enforcement laws. In many states new legislation was constantly being added to the original enactment, in an effort to close gaps which had unexpectedly appeared and to increase penalties which seemed too lenient.

On the whole the states had made an exceedingly thorough job of their enforcement codes, not only matching the Volstead Act, but measurably outdoing it. Sixteen states had set their standard of intoxicating liquor at an even lower percentage than the one half of one per cent established by the Volstead Act.<sup>59</sup> Other states had prohibited the possession of liquor under any circumstances, even though legally acquired before the adoption of the Eighteenth Amendment. Practically all states immensely broadened the powers of search and seizure which the Volstead Act had given to agents of the federal government.<sup>60</sup>

On certain points state legislation was particularly drastic. Vermont adopted a "disclosure law" carrying a prison penalty for persons who failed to reveal their source of liquor if arrested for intoxication. Iowa prohibited the sale or manufacture of canned heat or other compounds from which alcohol could be extracted for beverage purposes. Indiana made it illegal for jewelers to display pocket flasks or cocktail shakers in the windows of their shops.

<sup>59</sup> *State Coöperation in the Enforcement of National Prohibition Laws*, United States Treasury Department, 1930, p. 26.

<sup>60</sup> *Ibid.*, p. 29.

Nevertheless, despite the formidable character of the state legislation which had been enacted by the end of 1926, there was an unmistakable hiatus in many instances between the law and its enforcement. It was one thing to adopt a drastic law and another thing to provide enough enforcement agents to detect violations of this law, enough police to arrest the violators, enough courts to try prohibition cases with reasonable promptness and enough jails to hold the guilty.

A case in point may be cited from the experience of New York. In April, 1921, the legislature of that state adopted the Mullan-Gage Law, closely patterned on the Volstead Act and carrying heavy penalties for violations. Simultaneously, however, the legislature failed to make any special appropriation to enforce this new state code and refused, meantime, to adopt a bill which would have dispensed with the right to trial by jury.<sup>61</sup>

The result of this action might have been anticipated by 1926, if not in 1921. The Mullan-Gage Law had been signed by the Governor on April 5, 1921. Within ten days the assistant district attorney in charge of prosecutions under the law in New York City reported that ten times as many cases had already accumulated as the existing machinery of state courts could handle and declared that he had found it difficult to obtain satisfactory juries.<sup>62</sup>

From this point forward, the problem of congestion in the courts and of unsatisfactory juries increased rather than diminished. In the third week following the enactment of the law, the same Governor who had signed it announced that he "might convene an extra-

<sup>61</sup>New York *Times*, April 15, 1921.

<sup>62</sup>*Ibid.*, April 16, 1921.

ordinary term of the State Supreme Court and assign justices to help clear up the calendars."<sup>63</sup> At the same time, the district attorney's office in New York City called for volunteers to serve without pay in helping it handle an unprecedented flood of business;<sup>64</sup> the Police Commissioner asked for an additional \$2,000,000 to enable him to increase his force;<sup>65</sup> the Department of Plants and Structures reported that the police had already seized enough samples of liquor to occupy the attention of the city chemist for a year.<sup>66</sup>

Approximately on this pattern the experiment continued for two years. What it might have accomplished if the legislature had been ready to create an army of state police and willing to abolish trials by jury there is no way of telling. What it actually accomplished, in the existing circumstances, may be measured by noting its results in New York County: an accurate test, since the whole purpose of a state law was to enforce prohibition not in the rural communities where enforcement was no problem, but in urban centers where enforcement had been lax.

Basing its figures on court records, the Committee on Criminal Courts, Laws and Procedure of the Bar Association of New York reported that a total of 6,902 cases had been presented to the Grand Jury under the Mullan-Gage Law while it was in force; that 6,074 of these cases, or 88 per cent, had been dismissed; that 496 cases, or 7.2 per cent, had been settled by pleas of guilty;

<sup>63</sup>*New York Times*, April 22, 1921.

<sup>64</sup>*Ibid.*, April 18, 1921.

<sup>65</sup>*Ibid.*, May 10, 1921.

<sup>66</sup>*Ibid.*, April 19, 1921.

and that only 20 cases, or three-tenths of one per cent, had resulted in conviction and a jail sentence following a trial by jury.<sup>67</sup>

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If the Mullan-Gage Law differed from most state legislation in the fact that its span of life was brief, it had one point in common with the average state enforcement code: it had little authority behind it by way of an appropriation from the public treasury.

It is true, of course, that the enactment of a state law opened the state courts to prohibition cases and in theory relieved the federal courts of carrying the whole burden of enforcement. There was little profit, however, in opening the state courts if they were promptly to be closed again by a glut of more cases than they could handle, precisely in those districts in which the law was disobeyed most frequently. If the states really wished to enforce prohibition where it was disobeyed, it was plainly important not merely to make laws, but to create courts in which to punish violations of these laws and to supplement the casual efforts of municipal police and county law officials with state machinery of enforcement. Such efforts, of course, cost money.

How much money the states expended to enforce their own state codes in the first three years of prohibition it is impossible to say, for the reason that it was too small a sum to be itemized separately in the financial data of the Census Bureau. In 1923, however, a total of \$548,629 was spent by the states specifically for the

<sup>67</sup>New York *Times*, January 29, 1928.

purpose of enforcing prohibition.<sup>68</sup> By 1927 this sum had increased to \$689,855.<sup>69</sup>

Here, in the eighth year of prohibition, was something less than three quarters of a million dollars for enforcement. It was contributed by eighteen states. Thirty states, twenty-eight of which had state enforcement acts, contributed nothing. Three States—Utah, Nevada, and Missouri—contributed less than \$1,000, Utah's contribution being \$160. Seven states contributed between \$1,000 and \$25,000. The largest contribution was \$146,577 in the case of Ohio. The grand total contributed by all of the states was a little less than one twenty-fifth of one per cent of their total expenditures for all purposes. It was approximately half of what they spent on regulating the sale of oil and gas and approximately one fourth of what they spent on maintenance of their monuments and parks.

These figures are revealing. They suggest one reason why officials of the federal government had so frequently complained, from the start of this experiment, of a lack of effective assistance by the states; why the first prohibition commissioner had declared at the end of his first year in office that some of the states seemed willing to let the federal government struggle along without their help;<sup>70</sup> why the Department of Justice had insisted that "except in one or two states" the state courts were not carrying their proper share of "the prohibition

<sup>68</sup>*Financial Statistics of the States, 1923*, Bureau of the Census, pp. 90-91.

<sup>69</sup>This figure and the figures cited in the following paragraph are quoted from *Financial Statistics of the States, 1927*, Bureau of the Census, pp. 80-81.

<sup>70</sup>*New York Times*, April 27, 1921.

burden";<sup>71</sup> why President Harding had declared in 1923: "A good deal of testimony comes to Washington that some states are disposed to abdicate their own police authority in this matter and to turn over the burden of enforcement to the federal authorities." Presumably this meant the wet states. As for the dry states: "It is a singular fact that some states which successfully enforced their own prohibition statutes before the Eighteenth Amendment was adopted have latterly gone backward in this regard."<sup>72</sup>

Three years after one President lamented the unwillingness of the states to lend the federal government more effective support, another President issued an executive order proposing to appoint state officials as agents of the federal government.

If this proposal ended nowhere, at least it suggested the existence of a problem in coöperation which had not been solved.

With one or two exceptions, the state legislatures had given the friends of prohibition enough laws, and enough drastic laws, to satisfy them to their hearts' content. At the same time they had not bothered the opponents of prohibition either with strict enforcement or high taxes.

For communities within the states, as for states within the nation, there remained a large degree of local option.

<sup>71</sup>Chapter VI, *supra*.

<sup>72</sup>Address at Denver, June 25, 1923.

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## CHAPTER IX

### The Appearance of Organized Opposition

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ENFORCEMENT of the law marked time in 1926 and 1927. Congress stood pat. A three-to-one majority was not large enough to ratify the Andrews program. The states appropriated no new funds to vitalize their ample legislation. The controversy over "poison alcohol" and under-cover work had unleashed a vast amount of argument but failed to arm the government with any power which it did not have before. In all its major characteristics the pattern of enforcement had not greatly changed since 1920. If any fundamental change had taken place in this interval of seven years it was not in the method employed by Congress to carry the experiment with national prohibition through to a successful end, but in the character of the opposition to the law.

To understand the extent and the significance of this change it is necessary to recall the auspices under which opposition to the Eighteenth Amendment had originally appeared. In 1917 it was the brewers and distillers who invoked the argument of home rule and championed the doctrine of states' rights. Organized labor filed its protest against this legislation in a stormy meeting at the Capitol.<sup>1</sup> Various associations of hotel keepers employed counsel to protect their interests. Here and there a real

<sup>1</sup>Chapter II, *supra*.

estate board adopted resolutions. But in the end it was the brewers and distillers who led the opposition to the law and organized its efforts.

It was the Distillers' Association of America which carried the fight to the state legislatures in an effort to prevent ratification, organized emergency committees and attempted unsuccessfully to force a referendum vote in fourteen states.<sup>2</sup> It was the United States Brewers' Association, and not an association interested in the theory of the Constitution or the bill of rights, which briefed the case against the Volstead Act and submitted its brief to the President with a petition for his veto.<sup>3</sup> It was the firm of Feigenspan, New Jersey brewers, which employed Elihu Root and William D. Guthrie to carry a last desperate appeal to the Supreme Court of the United States.<sup>4</sup>

Throughout the whole controversy over national prohibition from the time Senator Sheppard's resolution for a constitutional amendment first appeared in Congress to the June day in 1920 when the Supreme Court upheld the Volstead Act, the opposition to this legislation had no funds, no organization and no real leadership except in so far as these elements were supplied by the liquor interests of the country.

With the exception of union labor there were no important organizations arrayed in opposition to this program. There were no independent organizations in the field whose motives were disinterested and whose constituents were drawn from the rank and file of ordinary citizens.

In the matter of making public sentiment either for or

<sup>2</sup>New York *Times*, January 30, 1919.

<sup>3</sup>Associated Press dispatch, Washington, October 15, 1919.

<sup>4</sup>New York *Times*, March 28, 1920.

against the law, of arguing the case before Congress and of persuading members of the state legislatures on which side safety lay, the struggle over the Eighteenth Amendment was a straight-out struggle between the liquor interests on one side and the allied prohibition organizations on the other.

## §

It was more or less inevitable that this should be the case. Presumably if the conflict had come over the question of prohibiting the manufacture, sale and transportation of tobacco rather than of alcohol, the character of the opposition would not have varied greatly, though it might have come most vigorously from other sections of the country.

The plantation owners of the South would have opposed this legislation. The various associations representing manufacturers, wholesalers, and retailers would have organized lobbies, petitioned the state legislatures, and battled to protect their interests. The individual smoker might have grumbled. He might have insisted that it was no business of a federal Congress to regulate standards of conduct within the states. With sufficient provocation he might have volunteered to march in a protest demonstration, provided the weather happened to be right. He might have made it a point to vote against his Congressman, if he made it a point to vote at all. But he would scarcely have been found, at the time this controversy reached its height, enrolled as an active member of a protective smokers' league, tirelessly working to convert his neighbor to his point of view, and paying faithfully at the end of every month dues which would have helped finance an endless flow of ardent and devoted propaganda.

It is probably inherent in the nature of a reform movement that those who favor the reform should be more alert and better organized than those who are opposed to it. The reformer sees in the existing situation an immediate menace to morals or to public safety which spurs him into action. The opponent of the reform is usually self-satisfied. He may admit that in certain respects an existing situation needs improvement. He is usually willing to let someone else improve it. No menace appears in his case until the efforts of the reformer have become so formidable as to threaten him with a law of which he disapproves. It is apparently a rare case in which he has foresight enough to anticipate this danger until it overtakes him.

Unquestionably it was a factor of some importance in the adoption of the Eighteenth Amendment that those people who disliked and distrusted prohibition as a method had never been willing or able to organize their opposition. Even in the South and West there had always been material with which to create more than a mere shadow of effective opposition. The South and West had not been overwhelmingly in favor of prohibition even on a basis of state action and even in the modified form in which it was frequently proposed. On the contrary, the division of opinion had been fairly close. In the eleven states in the South and West which adopted prohibition by popular referendum in the three years before the war, 44 per cent of the vote had been cast against this legislation.<sup>5</sup>

This was a respectable minority. Yet the people who polled so large a percentage of the vote were wholly unrepresented by any organization which could state their point of view persuasively. They had nothing re-

<sup>5</sup>Cf. Appendix A.

mately comparable with the Anti-Saloon League and its successful method of straddling both parties in an effort to send dry candidates to the state capitals and to Washington. They had no organizations continuing from one year to another which could meet the arguments of the prohibition organizations with counter-arguments. They had only their individual opposition to the law, what money the brewers poured into local campaigns with a generosity which was frequently more damaging than useful and what leadership they could derive from the entirely self-interested enthusiasm of an industry fighting for its own existence.

It is idle even to guess whether the Eighteenth Amendment would have been adopted in 1919 if the people opposed to it on principle had set out systematically to organize their opposition twenty years before it reached a vote in Congress. The question was not tested. The opponents of national prohibition never fought their battle. They chose to lose it by default.

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It was one of the unmistakable results of seven years of national prohibition that a number of organizations independent of the once almighty brewers and at least theoretically capable of serving as focal points around which effective opposition to the law could cluster came into existence in the years from 1920 to 1927.

In 1923 the Moderation League was incorporated in New York for the purpose of creating sentiment in favor of modifying the Volstead Act by an amendment which would give "a reasonable and workable definition of intoxicating liquors."<sup>6</sup>

<sup>6</sup>Associated Press dispatch, Albany, September 1, 1923.

In 1926 the Association Against the Prohibition Amendment, originally incorporated under the laws of the District of Columbia on December 31, 1920, joined hands with the Moderation League, the American Federation of Labor, and the Constitutional Liberty League of Massachusetts in presenting evidence to Congress in an attempt to prove that the law had not been and could not be successfully enforced. Testifying before a subcommittee of the Senate, the chairman of this association stated that by 1926 his organization had enrolled 720,000 members.<sup>7</sup>

In 1927, "tired of taking a halfway position," the Women's Committee for Modification of the Volstead Act changed its name to the Women's Committee for Repeal of the Eighteenth Amendment and adopted as its slogan "the restoration of the bill of rights."<sup>8</sup>

In this same year a movement for repeal was initiated among the bar associations of the country by a group of lawyers in New York City who incorporated themselves as the Voluntary Committee of Lawyers and who based their opposition to national prohibition essentially on legal grounds: "The Eighteenth Amendment is inconsistent with the spirit and purpose of the Constitution of the United States and in derogation of the liberties of the citizens and rights of the states as guaranteed by the first ten amendments thereto."<sup>9</sup>

The movement initiated by these lawyers made substantial progress in the larger cities. The Law Association of Philadelphia had already declared itself opposed

<sup>7</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 44.*

<sup>8</sup>*New York Times, November 3, 1927.*

<sup>9</sup>*Ibid., December 11, 1927.*

to national prohibition.<sup>10</sup> In 1928 the Bar Association of New York adopted a resolution asserting it to be "the sense of this association that the Eighteenth Amendment, the Volstead Act and all orders and regulations for the enforcement thereof should be repealed and the subject of prohibition be remitted to the sole regulation of the several states."<sup>11</sup> Within two years similar action was taken by the Boston Bar Association, the New Jersey State Bar Association, the Detroit Bar Association, the St. Louis Bar Association, the San Francisco Bar Association, and the Bar Association of Portland, Oregon. In 1930 the American Bar Association itself approved a proposal for repeal, by a referendum vote of 13,779 to 6,340.<sup>12</sup>

If proof were needed that a new type of opposition had come into the field, this protest by the bar associations furnishes it. For the bar associations had remained aloof from this whole controversy in 1917 and 1918. None of these organizations which now adopted resolutions had been sufficiently concerned with the question of national prohibition to oppose it on constitutional grounds at the time of its adoption.

## §

To the militant prohibition organizations which had long been accustomed to facing the brewers and distillers as their only adversaries, this change in the character of the opposition to the Eighteenth Amendment was novel and on the whole unwelcome. The brewers and distillers made ideal opponents for the champions of pro-

<sup>10</sup>New York *Times*, March 9, 1927.

<sup>11</sup>*Ibid.*, February 15, 1928.

<sup>12</sup>*Ibid.*, November 19, 1930.

hibition. They could be described, and in all fairness, as interested parties to this dispute, primarily concerned with the preservation of their own profits. They could be denounced as bitter-end opponents of any reformation of the saloon and as adversaries desperate enough in their choice of weapons to resort to the use of a blacklist.<sup>13</sup> Inevitably there was more satisfaction in sinking a righteous sword into the bowels of such opposition than in arguing the merits of prohibition with miscellaneous committees of lawyers, business men, and bankers.

In these circumstances it was tempting for the friends of prohibition to believe that the new organizations which had appeared in opposition to the law were merely a screen for the same old opposition which they had always faced: at best, the work of well-meaning people who had been duped by the propaganda of the liquor interests; at worst, pretentious organizations which claimed to be disinterested but actually depended for support on the brewers or their allies.

Nevertheless, though the friends of prohibition clung to the theory that there had been no change, they were in reality dealing with a different situation. In 1917 the chief spokesman of the opposition was the president of the United States Brewers' Association. In 1927 leadership of the opposition had passed to the president of the Pennsylvania Railroad or to the chairman of the board of the General Motors Corporation or to the president of the Western Union Telegraph Company, all of which organizations had once been on the brewers' blacklist.<sup>14</sup>

In 1917 it was the Distillers' Association of America,

<sup>13</sup>Chapter I, *supra*.

<sup>14</sup>Testimony of W. W. Atterbury, *Hearings of the House Judiciary Committee*, February 26, 1930.

eager to protect its vested interests in the liquor traffic, which sought to convince the state legislatures that the Eighteenth Amendment could not be successfully enforced. In 1927 it was a committee of members of the New York Bar Association which insisted that the Eighteenth Amendment had "proven a source of confusion and hindrance in the interpretation and administration of the entire body of the law."<sup>15</sup>

There was a fundamental difference here. Whether or not the friends of prohibition were prepared to recognize the fact, there were people who could differ with them honestly over the theory of the Eighteenth Amendment and over the results which it had achieved in practice. These people may have been either wise or unwise. They may have failed to see as far into the future as the friends of prohibition, or they may have seen still further. In either case their opposition to the law was based in many instances on an honest and deeply rooted conviction that this experiment had been disastrous; that it had attempted to solve an age-old problem by ignoring the fundamental factor of variations in local sentiment, and that it had broken down barriers which had hitherto protected individual Americans against a centralized authority in Washington.

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There was one important influence in the development of opposition to the law which the friends of this experiment bitterly resented. This influence was the prestige of the daily press in the larger cities of the country. "Day by day," said a witness appearing before a committee of Congress in 1930, "the great metropolitan

<sup>15</sup>New York *Times*, December 11, 1927.

newspapers of the country are dropping poison in the breakfast cups of millions of people.”<sup>16</sup>

With this criticism many friends of the law had long agreed. A committee of the quadrennial conference of the Methodist Episcopal Church in 1927 denounced “the falsehoods of that part of the daily press which continues to lend comfort to the enemies of prohibition” and urged a boycott of such newspapers in advertising and subscriptions.<sup>17</sup> The Board of Temperance, Prohibition and Public Morals of the same church insisted that “New York is bombarding the West with anti-prohibition propaganda, which in practice proves to be an incitement to violation of the law.”<sup>18</sup> The general superintendent of the Anti-Saloon League regretted “the power of the press to magnify every failure, misfortune or mistake in connection with prohibition out of all proportion to its proper relation toward a great national reform.”<sup>19</sup> Representative Fort of New Jersey declared that “the agitation against prohibition has equalled in intensity any agitation in our history; never have our great and powerful newspapers thrown the whole weight of their influence practically unanimously on the same side of a question before.”<sup>20</sup>

Two theories were suggested by the friends of prohibition to explain this bias which they detected in the metropolitan newspapers. According to one theory, the press of the larger cities had been purchased outright or effec-

<sup>16</sup> Hearings of the House Committee on the Judiciary, 71st Congress, 2d Session, Serial 5, pt. 2, p. 648.

<sup>17</sup> Associated Press dispatch, Kansas City, May 14, 1927.

<sup>18</sup> New York Times, October 4, 1925.

<sup>19</sup> New York Herald Tribune, June 10, 1929.

<sup>20</sup> Congressional Record, 71st Congress, 2d Session, pp. 2789–2792.

tively subsidized by the brewers and distillers. According to the second theory, the press in the larger cities merely catered to the known prejudice of its clientele by publishing material which would bring the law into disrepute. In either case, the essential criticism brought against the press was that it persisted in giving a vast amount of space, headlines, and emphasis to every problem which the law encountered, large or small, though prohibition had now been written into the Constitution.

On the whole, it was probably a fair criticism. It was a criticism, however, which could have been applied with equal fairness to many newspapers in small towns and villages in which the law itself was popular, provided these journals were in touch by telegraph with the world around them. Prohibition had brought a number of new and exciting elements into American life. It had either introduced or provided with a new field of activity the bootlegger, the hijacker, the rum-runner, the speak-easy, the illicit still, the government drive, and the police department round-up. All of these elements were essentially the stuff of which news is made. A press whose business is to sell papers took to them as naturally and as willingly as it would have reported any other news which had color, drama, and adventure.

No doubt a great majority of the newspapers published in the larger cities were frankly opposed to prohibition and more opposed to it in 1927 than in 1920.<sup>21</sup> In this attitude they shared the opinion of many people in their communities that prohibition had been a failure in the cities, however successfully it may have worked in rural sections of the country. No doubt it would be easy

<sup>21</sup>Cf. a poll of 110 newspapers by the New York *Herald Tribune*, April 7, 1930.

to cite many cases in which these newspapers had overemphasized news which was unfavorable to prohibition. It would also be easy to cite many cases in which they had overemphasized news which was favorable to prohibition, not because they shared this point of view, but because they were good enough merchants to recognize that a vast public interest had been aroused in prohibition and that anything which dealt in an interesting fashion with this question, from whatever angle, was good news.

The record of the *New York Times* is a convenient record to examine because that newspaper publishes an index of its news. In 1925, the same year in which the Methodist Board of Temperance declared that "New York is bombarding the West with anti-prohibition propaganda," the *New York Times* published eighteen statements from the Methodist Board of Temperance in behalf of prohibition. It published sixty-nine items of news concerning the activities of the Anti-Saloon League, its pleas for strict enforcement, its tributes to the success of prohibition, and its replies to critics of the law. It published eighty-two statements from officials of the federal government, outlining optimistic plans to make enforcement a reality and summoning the public to obey the law.

It was the *Times*, and not some journal in the Middle West, pledged to the cause of prohibition, that served as the medium through which Mr. Wheeler's syndicated articles were broadcast to the country.<sup>22</sup> It was the *Times* which published Mrs. Mabel Walker Willebrandt's reminiscences of her career in office<sup>23</sup> and the *Times* which featured in no less than forty-two install-

<sup>22</sup>*New York Times*, March 28 to April 4, 1926.

<sup>23</sup>*Ibid.*, August 5 to 25, 1929.

ments the long narrative in which Major Roy A. Haynes summed up a record of achievement under the Eighteenth Amendment which was "nothing short of marvelous."<sup>24</sup>

In the files of the metropolitan press there can be found glowing reports of the progress of prohibition as well as sensational chapters in its breakdown. If there is less material of the first type than the second it was at least in part because the communiqués of the friends of prohibition failed in the long run to keep pace with an endless series of exciting violations.

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Whatever the net result of the vast literature of prohibition published by the daily press (the *New York Times* printed 16,231 items of prohibition news between 1920 and 1927), unquestionably a large number of powerful newspapers in many widely scattered cities had taken an editorial position in direct opposition to the law. To critics of the Eighteenth Amendment this seemed entirely reasonable and as definitely a sign of the times as the appearance of opposition among the bar associations and the women's clubs. To friends of the Eighteenth Amendment these newspapers had chosen to flirt with treason and to adopt an editorial position wholly unrepresentative of the real convictions of the American people on the question of national prohibition.

What the real convictions of the American people were, it is impossible, of course, to say. There had been no referendum on the adoption of the Eighteenth Amendment; there had been no referendum after its adoption; there was no provision in the Constitution

<sup>24</sup>*New York Times*, July 15 to August 26, 1923.

for a referendum and no likelihood that if such a provision had existed Congress would have chosen to invoke it. Such estimates of American opinion as were freely offered during the years from 1920 to 1928 were based not on evidence as precise as the data of the Census Bureau, but on deductions drawn from three inconclusive sets of figures.

### *i. Official Polls*

Down to the end of 1928, nineteen referendums on some phase of prohibition had been held under the auspices of various states. Nine of these referendums were on questions of modifying the Volstead Act through some state device or of appealing to Congress to modify it or of appealing to Congress to repeal the Eighteenth Amendment outright. Two of these nine referendums were won by the drys: Ohio in 1922 and Colorado in 1926. The other seven were won by the wets: Massachusetts in 1920; Illinois in 1922; Illinois, Wisconsin, Nevada, and New York in 1926; and Massachusetts in 1928.<sup>25</sup>

To the wets this record seemed to carry convincing proof of the unpopularity of the law, especially in large industrial states like New York, which had voted in favor of modification by a majority as large as three to one. To the drys these figures were unimportant. Referendums of this sort, they insisted, were essentially a waste of time, since it was impossible for an individual state to escape from the tight grasp of the Eighteenth Amendment through any modification program of its own and futile for it to petition Congress to help it in

<sup>25</sup>A tabulation of state votes on prohibition questions will be found in Appendix I.

this effort. The dry theory of these wet victories was simply that the wets voted and the drys did not, choosing rather to boycott such referendums as empty gesture.

No doubt this is what happened in many instances. In New York, for example, a deliberate boycott by the drys is the only reasonable explanation of the fact that 543,166 fewer votes were cast in the prohibition referendum in 1926 than were cast in the election of a Governor. In this case, however, sentiment in favor of a change was strong enough to make the boycott a fact of minor importance. If all of these 543,166 votes had been dry votes and if they had been cast solidly against the proposal for modification, this proposal would still have carried the state by a vote of 1,763,070 to 1,141,650.<sup>26</sup>

Meantime, there were certain cases in which a boycott was impossible if the friends of prohibition wished to protect a state enforcement law against repeal. However faint the voice of the states in Washington, they had undisputed power to decide this question for themselves. Ten referendums in five states were held in these same years on the question of enacting or repealing state enforcement codes. On this issue, armed with the persuasive argument that as long as the Eighteenth Amendment remained in the Constitution it was the duty of the states to help enforce it, the friends of prohibition won a very considerable measure of success. If they lost California once (in 1920), Massachusetts once (in 1922) and Montana twice (in 1926 and 1928), they won Massachusetts once (in 1924), North Dakota once (in 1928), Missouri twice (in 1920 and 1926), and California twice (in 1922 and 1926).<sup>27</sup>

<sup>26</sup>Cf. Appendix I.

<sup>27</sup>The popular vote in each of these referendums will be found in Appendix I.

Of ten contests over the question of state enforcement codes the drys had won six and lost four by the end of 1928. Of nine contests over the question of attempting to modify the law they had won two and lost seven. This was as much as could be claimed for either side as the result of what modest efforts had been made by official agencies of the states to measure the drift of local sentiment.

## *2. Unofficial Polls*

Meantime, a large number of wholly unofficial polls had been taken in these years. This was not surprising. Prohibition remained a controversial question before the American people. There was a natural interest in discovering, if possible, what the American people thought about it. The forty-eight states having held only nineteen referendums in eight years, an average of one referendum for each state every twenty years, it was inevitable that private agencies should have been tempted to explore the question somewhat further.

In theory, these unofficial polls taken by various newspapers, magazines, professional societies, trade unions and other agencies for the expression of opinion had two clear advantages and one clear disadvantage. The advantages lay in the fact that these polls were the only polls to cross state lines and the further fact that they offered several alternatives for a plain expression of opinion, instead of a choice at the polls between yes and no on some proposal which the individual voter may have liked but may have thought illegal. The obvious disadvantage lay in the fact that there was no certain way of telling whether the results of any poll accurately measured a cross-section of opinion or only a cross-section of such opinion as cared to mail a postcard.

In point of numbers and of territory covered, the two most important polls taken by any private agency down to the end of 1928 were the first *Literary Digest* poll in 1922 and a poll taken by the Newspaper Enterprise Association in 1926.

Employing the same method which it used in a later poll in 1930, the *Literary Digest* distributed ballots in 1922 among the forty-eight states, asking for an expression of opinion (1) in favor of the existing law, or (2) in favor of its modification to permit light wines and beer, or (3) in favor of complete repeal. In reply to this request 922,382 ballots were received, of which 38.6 per cent favored the law as it stood, 40.8 per cent favored modification, and 20.6 per cent repeal.<sup>28</sup> The satisfied vote was 38.6 per cent of the total; the dissatisfied vote, 61.4 per cent.

The results of the poll taken by the Newspaper Enterprise Association in 1926 were more spectacular. In this case 326 newspapers in forty-seven states participated in a poll of 1,747,630 people. Of the total vote cast, 18.9 per cent favored the existing law, 49.8 per cent favored modification, and 31.3 per cent favored repeal.<sup>29</sup> The satisfied vote in this case was 18.9 per cent of the total; the dissatisfied vote, 81.1 per cent.

As might have been anticipated, these were impressive figures to the opponents of prohibition, gathered by methods which they thought eminently fair. The *Literary Digest* had made an effort to distribute its ballots accurately between urban and rural districts in accordance with their voting strength. The Newspaper Enterprise Association had invited and obtained the

<sup>28</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, pp. 420, 439.

<sup>29</sup>*Ibid.*, p. 438.

coöperation not only of newspapers in the larger cities but also of many such newspapers in smaller towns as the *Iola* (Kans.) *Register*, the *Danville* (Va.) *Bee*, the *Dowagiac* (Mich.) *Daily News*, the *Hickory* (N. C.) *Record*, and the *Taylorville* (Ill.) *Breeze*. To the wets the net result was a reliable index of opinion and persuasive proof of widespread opposition to the law which had gained ground impressively between 1922 and 1926.

As might also have been anticipated, these same figures failed to carry conviction to the friends of prohibition. There was no way of knowing, the prohibition leaders insisted, how fairly these ballots had been counted, how many drys had failed to vote, and how many wets had voted twice. In the opinion of the Anti-Saloon League such polls as these were not only wholly unreliable and entirely misleading but "in effect, whether so intended or not, part of the wet agitation and propaganda."<sup>30</sup>

There is no way in which to test the validity of these rival theories to the satisfaction of both parties. Comparisons are sometimes made between the vote cast in the *Literary Digest* poll in 1922, in California or in Massachusetts, and the vote cast in these same states in the same year on the enactment of state enforcement laws. Such comparisons are unreal, since the two polls raised different issues. A more accurate comparison could be made between an unofficial poll and an official poll in which the same question was placed before the voter: for example, the question of modifying the Volstead Act to permit light wines and beer. All such polls, however, while convincing to the wets, were unsatisfactory to the drys as a test of public sentiment, whether official or unofficial.

<sup>30</sup>New York *Times*, March 14, 1926.

*3. Elections to Congress*

There remained one other test of sentiment and to the friends of prohibition it was the only right one. "The only legal referendum on federal questions," insisted the Anti-Saloon League, "is the election of federal officers who vote on such issues."<sup>31</sup> Straw ballots made no legislation. The one certain test of public opinion was the election of a federal Congress which actually had power to make laws or to unmake them.

In this respect the drift of opinion seemed to the drys to be unmistakably in their favor. A dry Congress had adopted the Eighteenth Amendment and written the Volstead Act. Subsequently, said Mr. Wheeler in 1926, "each year the Congress that has been elected has been drier than its predecessor."<sup>32</sup>

On this point, however, Mr. Wheeler's figures did not entirely bear him out. His analysis of the results of the 1926 elections showed that "71 per cent of the Democratic members and 72 per cent of the Republican members of the House, with 70 per cent of the Democratic members and 76 per cent of the Republican members of the Senate, have dry voting records or have made dry pronouncements."<sup>33</sup>

In the original test of strength on the adoption of the Eighteenth Amendment in 1917 prohibition had the support of 69 per cent of the Democratic members and 69 per cent of the Republican members of the House; 75 per cent of the Democratic members and 78 per cent

<sup>31</sup>*New York Times*, March 13, 1926.

<sup>32</sup>*Hearings of a Subcommittee of the Senate Judiciary Committee*, 69th Congress, 1st Session, p. 868.

<sup>33</sup>*New York Times*, November 6, 1926.

of the Republican members of the Senate. On the basis of Mr. Wheeler's figures in 1926 the friends of prohibition had gained some ground in the House, but lost more in the Senate.

Nevertheless, the dry majority was comfortably large. There was no question of its ample power in 1926 to block any proposal looking toward modification of the law or its repeal. To this extent the friends of prohibition had command of the situation. The opponents of prohibition were faced by the task of explaining the continued presence of a dry majority in Congress if public opinion itself, as they believed, and as they sought to prove from the results of many official and unofficial referendums, was so predominantly in favor of a change.

One theory on which the opponents of the law relied, to explain their lack of success in Congress, was the theory that Congress itself had denied wet districts of the country their proper share of representation through its failure to reapportion seats in the House of Representatives following the 1920 census. It is not a particularly impressive theory, though there can be no question that Congress had chosen cheerfully to nullify a basic article of the Constitution. Reapportionment would have changed no seats in the Senate and only a handful in the House.

A more persuasive argument, though one less often cited, lay in the fact that representation in Congress was so apportioned within the states that rural districts frequently enjoyed a superiority out of proportion to their numbers. In Wisconsin, for example, the legislative districts containing the two largest cities in the state, Milwaukee and Racine, had one representative in Congress in 1926 for every 269,000 people; the other dis-

tricts, one representative for every 228,000 people.<sup>34</sup> In New York, the districts containing New York City had one representative for every 249,000 people; the rest of the state one for every 232,000 people.<sup>35</sup> In Illinois, Cook County had one representative for every 312,000 people; the rest of the state one for every 223,000 people.<sup>36</sup> It took three people in Cook County to equal two outside.

Nevertheless, with due allowance for all this, the fact remains that the opponents of prohibition had never attempted to offset this disadvantage by organizing an effective opposition. The first signs of such opposition began to appear only after 1923. The strategy of the average Congressman in doubtful territory, in these circumstances, was to play the situation both ways as effectively as possible. By making what Mr. Wheeler described as "dry pronouncements" he could win the valuable support of the Anti-Saloon League and its allies. By keeping the cost of enforcement so low that it would neither add unwelcome taxes nor shut off the sources of illicit liquor he could hope to stave off an organized political revolt on the part of the opponents of the law.

The net result could accurately be described as a stalemate. The friends of prohibition had elected a Congress which would make dry pronouncements till the record bulged. The enemies of prohibition had impressed this Congress with the desirability of making no real effort to enforce the law.

It was a Congress with a three-to-one majority for prohibition that knifed the Andrews plan.

<sup>34</sup>*Congressional Directory*, January, 1926, pp. 127-130.

<sup>35</sup>*Ibid.*, pp. 70-83.

<sup>36</sup>*Ibid.*, pp. 22-27.

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The sharpest change in the membership of Congress since 1917, as analyzed by Mr. Wheeler nine years later, had come on the Democratic side of the Senate. This was the result of the election of wet Democrats in several of the large industrial states. A powerful faction of the party had its stronghold in the urban sections of the North and East. It was the increasing strength of this faction and its insistence on the necessity of a change, coupled with the reluctance of another faction of the party in the South and West to recognize the desirability of a change, which resulted in the curious decision of the Democratic party in 1928 to nominate a wet candidate for President on a platform favoring strict enforcement.

There was an unmistakable confusion of purposes here which time did not remove. On the contrary, not only did the confusion of purposes remain to the end: it rapidly became the business of statesmen in both parties to magnify it rather than to dissipate it.

On the Democratic side, it was obviously good tactics to emphasize the importance of Governor Smith's theories in the cities and simultaneously to minimize the importance of his theories in the rural sections of the country, where they were certain to be unpopular. On the Republican side it was equally good tactics to reverse this policy, to emphasize the importance of Governor Smith's theories in the rural sections and to belittle the importance of his theories in the cities.

Thus, while Senator Borah was traveling through the smaller cities of the South and West, insisting that the cause of national prohibition now faced a crisis and

warning the women voters of these towns that Governor Smith "proposes to destroy the effort which you have made to protect the American home,"<sup>37</sup> Mr. Charles Evans Hughes was traveling through the larger cities of the North and East, assuring Republican voters that Governor Smith's program could not possibly involve a serious threat to the cause of national prohibition and dismissing the whole controversy as a mere "sham battle."<sup>38</sup> While Republican drys in the smaller towns of Kansas were girding themselves to defend the Constitution, Republican wets in Massachusetts were being told by a Kansas Senator, Mr. Curtis, that the Constitution was never more secure. "Don't let the Democrats fool you. They cannot amend the Constitution as Congress is constituted. . . . Don't grasp at the straw, because it won't hold you."<sup>39</sup>

Meantime, it did not help clarify the issue to have Mr. Hoover's views, on the other side of this controversy, widely interpreted in dry sections of the country as uncompromisingly in favor of prohibition and widely interpreted in wet sections of the country as offering hope of an immediate change.

Throughout the whole campaign an influential part of the Republican press in the larger cities differed on this point with the Republican press in the smaller towns, insisted that Mr. Hoover had never been identified with the prohibition movement, declared that his attitude toward the whole question was essentially open-minded, and argued that he would be in a far

<sup>37</sup>Speech at Salisbury, N. C., *New York Times*, October 17, 1928.

<sup>38</sup>Speeches at Buffalo, Worcester, Mass., and Brooklyn, *New York Times*, October 27, October 31, and November 1, 1928.

<sup>39</sup>*New York Times*, September 7, 1928.

more favorable position than Governor Smith to change the law, since he would not be handicapped within his own party by the opposition of the Solid South. One of the major triumphs of the campaign, for this section of the Republican press, was the discovery that Mr. Hoover had once expressed the opinion in a statement made as Food Administrator that it was "mighty difficult to get drunk on 2.75 per cent beer."<sup>40</sup>

If Kansas now chose to read Mr. Hoover's campaign speeches as a stirring repudiation of any and all plans to modify the law, the New York *Herald Tribune* threw its hat into the air over a statement of purposes which "plainly left the door open for such reforms as a new definition of what are intoxicating liquors."<sup>41</sup>

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However cautious historians a decade hence may be in assessing the individual importance of the complex political, social, and economic influences which played a part in the 1928 campaign, there was no hesitancy on the part of leaders on both sides of the prohibition question to rush into print with ultimate conclusions on the morning after the election.

To the Methodist Board of Temperance it seemed clear that in Mr. Hoover's victory the great referendum on prohibition had at last been held,<sup>42</sup> to the New York *Herald Tribune* that an attempt to work out a constructive solution of the problems created by the Volstead Act would now begin,<sup>43</sup> to Dr. Francis Scott McBride

<sup>40</sup>Statement to the press, June 5, 1918.

<sup>41</sup>New York *Herald Tribune*, August 17, 1928.

<sup>42</sup>New York *Times*, November 8, 1928.

<sup>43</sup>New York *Herald Tribune*, November 8, 1928.

that "the result is a thorough vindication of the Anti-Saloon League"<sup>44</sup> and to Dr. Nicholas Murray Butler that 21,000,000 wet votes had been cast in the election.<sup>45</sup>

With the slight advantage of a few years' perspective, it is difficult to-day to guess what part prohibition actually played in the campaign of 1928, to what degree it was shadowed by such issues as prosperity, how large an element of the Republican party in the larger cities voted for Mr. Hoover believing his candidacy carried promise of a change, and whether the Smith campaign was a meteoric interruption or a logical development of the organized opposition which was now beginning to appear.

Perhaps the one certain thing that can be said of 1928 is that a candidate who had described prohibition as an ambitious experiment was now assured an opportunity to see what he could make of it.

<sup>44</sup>New York *Times*, November 8, 1928.

<sup>45</sup>*Ibid.*, November 20, 1928.

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## CHAPTER X

### The Hoover Program

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TWENTY-FOUR hours before Herbert Hoover took his oath of office on March 4, 1929, two incidents occurred which brought the story of enforcement up to date. On March 3d Mr. Hoover's predecessor in the White House signed the Jones Law. On the same day Congress disposed of a bold proposal to add \$256,000,000 to the budget of the Prohibition Bureau by deciding that one per cent of this sum would be ample.

Debate over these two questions had precipitated a series of sharp disputes in Congress during the four months which elapsed between Mr. Hoover's election and his inauguration. The Jones Law, warmly endorsed by the leading prohibition organizations, added an amendment to the Volstead Act increasing the maximum penalties of that legislation to five years' imprisonment or \$10,000 fine, or both. This measure was brought before the Senate on February 19th and adopted by a vote of 65 to 18, after a clause had been inserted expressing the Senate's intention that the courts "discriminate between casual or slight violations and habitual sales of intoxicating liquors or attempts to commercialize violations of the law."<sup>1</sup> With the Senate's decision the House concurred, by a vote of 284 to 90.<sup>2</sup>

<sup>1</sup>*Congressional Record*, 70th Congress, 2d Session, p. 3742.

<sup>2</sup>*Ibid.*, p. 4796.

Meantime, the dispute over the item of \$256,000,000 had come before the Senate in a somewhat less orthodox manner and raised questions which were not so easily decided. During the debate on the Treasury appropriation bill Senator Bruce of Maryland offered an amendment which suddenly and unexpectedly multiplied the appropriation of the Prohibition Bureau approximately by twenty. Without debate, without a roll-call vote, and apparently in a moment of sheer carelessness, the amendment was accepted.<sup>3</sup>

Immediately Congress was in an uproar. Senator Bruce was a confessed opponent of the law. The drys at once insisted that he had proposed this large increase merely as a gesture and merely for the sake of embarrassing the cause of prohibition. In reply, Senator Bruce pointed to an official estimate made by the Commissioner of Prohibition. Dr. James M. Doran, whose loyalty to the law no one questioned and whose enthusiasm for prohibition had led the Methodist Board of Temperance to describe him as an "outstanding, sincere and trustworthy dry,"<sup>4</sup> had testified before a committee of Congress one week before this time that it would cost the federal government \$300,000,000 a year if it wished to undertake the responsibilities which the states neglected and attempt to enforce the law in every section of the country.<sup>5</sup> By adding \$256,000,000 to the routine appropriation of \$13,500,000 already available for the Prohibition Bureau, Senator Bruce's amendment still fell \$30,000,000 short of Dr. Doran's estimate.

<sup>3</sup>*Congressional Record*, 70th Congress, 2d Session, p. 518.

<sup>4</sup>*New York Times*, June 27, 1927.

<sup>5</sup>Testimony before the House Committee on Appropriations, December 5, 1928.

By whatever accident this item of \$256,000,000 had found its way into a Senate bill, here at last was an appropriation which took at face value the frequent assertions of the prohibition organizations that the law must be enforced regardless of the cost. None of the prohibition organizations, however, now raised its voice to welcome this appropriation or to defend it on the ground that an experiment with strict enforcement was fully worth the imposition of a quarter of a billion dollars in new taxes. Nor did the item of \$256,000,000 survive the Senate's sober second thought. Four days after the Senate put this appropriation into the Treasury bill, the Senate took it out.<sup>6</sup>

At this point, Senator Harris of Georgia proposed as a substitute that the budget of the Prohibition Bureau be increased to the extent of \$25,000,000. This was a much more modest plan. It made as little progress. Secretary Mellon opposed it, on the ground that after years of experience with smaller sums the Prohibition Bureau would not know what to do with a sudden appropriation of this size.<sup>7</sup> The drys in the House opposed it, on the ground that it would embarrass the Administration by increasing the cost of government and leading the country to expect too much enforcement all at once. With most of the leading drys arrayed in opposition, the proposal was rejected in the House by a vote of 240 to 141.<sup>8</sup>

In the end, after many conferences, much bickering, a long series of statements from the Treasury Department, and a long series of votes in Congress, a compromise was reached on an increase of \$1,719,654

<sup>6</sup>*Congressional Record*, 70th Congress, 2d Session, p. 725.

<sup>7</sup>*New York Times*, January 16, 1929.

<sup>8</sup>*Congressional Record*, 70th Congress, 2d Session, p. 2573.

instead of \$25,000,000 or \$256,000,000. This was more according to precedent. The compromise was accepted.<sup>9</sup> The incident was closed.

On the same day that this appropriation was finally ratified by the House of Representatives, Mr. Coolidge signed the Jones Law.

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Mr. Hoover thus entered office on the morning after a particularly clear-cut demonstration of the willingness of Congress to adopt more laws and its unwillingness to create machinery to enforce them. This was a familiar story. No two incidents could have summed up more effectively the experience of nine years of prohibition.

There were other familiar factors in the situation confronting the incoming President. The Prohibition Bureau remained essentially the same inadequate agency it had always been. In the five and a half years since Mr. Coolidge succeeded Mr. Harding, to be succeeded by Mr. Hoover, the Bureau had not changed materially. In midsummer of 1923 it had had 3,413 employees, including its office force. In the spring of 1929 it now had 4,129 employees.<sup>10</sup>

Meantime the problems of the Bureau had mounted in the same familiar curve. Shortly before Mr. Hoover entered office, the Department of Justice estimated that smuggling from Canada into the United States had increased by more than 75 per cent since 1925.<sup>11</sup> The production of industrial alcohol, with its inevitable opportunities for diversion, had increased from 57,000,000

<sup>9</sup>*Congressional Record*, 70th Congress, 2d Session, p. 5184.

<sup>10</sup>*New York Times*, March 24, 1929.

<sup>11</sup>*Ibid.*, December 4, 1928.

gallons in 1923 to 92,000,000 gallons in 1928.<sup>12</sup> The quantity of illicit liquor seized by Federal agents had steadily increased from 14,346,649 gallons in 1923 to 32,474,233 in 1928, more than doubling in six years.<sup>13</sup> There was nothing essentially new in this. The responsibilities of the Prohibition Bureau had always expanded at a more rapid pace than its equipment. The one new factor in the situation, as Mr. Hoover entered office, was Mr. Hoover's own proposal for an expert investigation of the problem of enforcement.

As originally proposed in Mr. Hoover's acceptance speech at Palo Alto, the plan for an investigation had been limited specifically to prohibition. Reiterating his earlier opinion that the Eighteenth Amendment was "a great social and economic experiment, noble in motive and far-reaching in purpose," Mr. Hoover had added this suggestion: "Common sense compels us to realize that grave abuses have occurred—abuses which must be remedied. An organized, searching investigation of fact and cause can alone determine the wise method of correcting them."

It was this comment which had enormously cheered the Republican press in the larger cities during the campaign and given it a text for its appeal to wet Republicans to vote for Mr. Hoover on the ground that his candidacy carried realistic hope of a change in a system which they disliked. Mr. Hoover had said that "grave abuses" had occurred. What were these abuses, asked the Republican press in the larger cities, if not the invasion of personal liberties, the breaking down of local authority by a federal bureaucracy and an

<sup>12</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 26.

<sup>13</sup>*Ibid.*, p. 64.

increasing disrespect of law? Moreover, Mr. Hoover had spoken not only of an organized, searching investigation of "fact" but an organized, searching investigation of "cause." If Mr. Hoover intended to go into the question of "cause," how could he avoid exploring the whole foundation of public opinion on which the Eighteenth Amendment rested?

Whatever the merit of this logic, the investigation originally proposed at Palo Alto had these two characteristics: it was to be directly concerned with prohibition, and it was to go into the question of cause as well as fact. In this form the proposal remained throughout the campaign and in this form its possible consequences were debated.

During the four months following the election, however, Mr. Hoover's plan for an investigation considerably expanded. The proposal had originally been aimed at one law. It was now to be aimed at all laws. "I propose to appoint a national commission," said the incoming President in his inaugural, "for a searching investigation of the whole structure of our federal system of jurisprudence, to include the method of enforcement of the Eighteenth Amendment and the causes of abuse under it. Its purpose will be to make such recommendations for reorganization of the administration of federal laws and court procedure as may be found desirable."

Plainly this was a more ambitious program than Mr. Hoover had originally proposed at Palo Alto. It was also a less satisfactory program to many of those people who had believed that Mr. Hoover's plan was intended to deal specifically and not incidentally with the problem of prohibition.

On one side, Senator Carter Glass complained, as a

friend of the Eighteenth Amendment, that prohibition had now been buried in a mass of detail. It was Senator Glass who had introduced the resolution which gave the President's new commission official status and provided it with funds. He had introduced his resolution, he insisted, for the purpose of initiating an investigation into the enforcement of prohibition. "In an unguarded moment," he now complained, "I allowed myself to be persuaded to insert the parenthetical words, 'together with enforcement of other laws.' There was no purpose on earth in making other laws the feature; this was a mere incident to prohibition enforcement. But now what has happened? The parenthesis has been made the main thesis. Prohibition enforcement has been submerged."<sup>14</sup>

Meantime, this new assignment given by the President to his commission was as disappointing to many opponents of the law as to many of its friends. Like Senator Glass, these opponents of the law regretted that prohibition was now to be considered merely as one detail in an investigation which would explore "the whole structure of our federal system of jurisprudence." Unlike Senator Glass, they also regretted that the President had instructed his commission to find methods of enforcing laws rather than to consider the question of whether laws were actually enforceable. For while Mr. Hoover had again referred in his inaugural to the necessity of investigating "causes" as well as "facts," he now affirmed that the purpose of such an investigation would be to discover ways of improving "the administration of federal laws and court procedure."

To those opponents of prohibition whose hopes had been aroused by Mr. Hoover's Palo Alto speech this

<sup>14</sup>New York Times, June 20, 1929.

decision was unfortunate. It seemed to limit the proposed investigation to a study of the machinery of enforcement, on the assumption that the law could be enforced, when the question of whether the law could be enforced was the real point at issue. If the law could not be enforced, then no amount of study would produce ways and means of enforcing it. To instruct the commission in advance as to what conclusion it must reach was to beg the question and to destroy the scientific value of the inquiry.

Moreover, to these critics of the law the President was guilty of serious misjudgment in lumping the Eighteenth Amendment with all other problems of law enforcement and instructing his commission to consider the prohibition of liquor as if it were precisely like the prohibition of murder, robbery, or arson. There was an indisputable distinction, the critics of the law insisted, between the enforcement of prohibition and the enforcement of the ordinary criminal law. This decision arose from the fact that the desirability of prohibiting murder or robbery or arson was not challenged anywhere by anyone, whereas the desirability of prohibiting liquor was challenged in many parts of the country by many men and women of unimpeachable character and position.

In these circumstances, critics of the law insisted that disobedience of the Volstead Act was not ordinary lawlessness. It was political rebellion. The proper analogy was not with ordinary criminal law but with the resistance of the Colonies to British taxation and with the resistance of the Southern states to Negro suffrage. There could be no realistic investigation of the problem of enforcing prohibition which did not take this distinction as its fundamental premise.

## §

It was on May 20th, two and a half months after his inauguration, that the President announced the appointment of a Commission on Law Enforcement and Observance, consisting of eleven members, with Mr. George W. Wickersham as chairman. Eight days later this commission met for the first time in Washington. "We are under no illusions as to the difficulty of our task," its chairman told the President. "We know there is no short cut to the millennium." To the press he added: "It should be understood that prohibition is only one angle of our survey. The attitude of the American people toward law enforcement is not bounded by prohibition. This commission is not to be the arbiter between the wets and drys, and I want to emphasize that it was not appointed to decide that question."<sup>15</sup>

It is an interesting fact that while both the friends and the foes of the Eighteenth Amendment now lamented the submergence of prohibition as an unimportant detail in the work of the President's commission, and while Mr. Wickersham echoed the opinion of the President that prohibition was only one of a very large number of questions which needed to be explored, both Mr. Wickersham and his commission were drawn in the direction of prohibition as irresistibly as if they were steel filings in the presence of a magnet.

On July 15th, approximately six weeks after he had insisted that it was no part of his commission's work to act as arbiter between the wets and drys, Mr. Wickersham proposed a possible plan of arbitration. In a letter addressed to Governor Roosevelt of New York and

<sup>15</sup>New York *Times*, May 29, 1929.

read by Mr. Roosevelt at the Governors' Conference, then in session at Groton, Conn., Mr. Wickersham suggested that the time had come for the states to accept a real share of the heavy burden of enforcement. "If the national government were to attend to preventing importation, manufacture, and shipment in interstate commerce of intoxicants, the states undertaking the internal police regulations to prevent sale, saloons, speakeasies, and so forth, national and state laws might be modified so as to become reasonably enforceable and one great source of demoralizing and pecuniarily profitable crime removed."<sup>16</sup>

Though this suggestion was obscurely phrased and somewhat casually proposed, both wets and drys interpreted the plan as evidence that Mr. Wickersham was prepared to purchase more effective state assistance in the enforcement of prohibition by giving the states more authority to decide for themselves what type of prohibition they would have.

To the wets this seemed a statesmanlike proposal, realistic enough to face what they regarded as the fundamental problem of enforcement. To the drys, however, any system which would permit one state to depart from the code established for the country as a whole was destructive of the essential principle of prohibition. It was accordingly the drys and not the wets who described this proposal as ill timed and who rebuked Mr. Wickersham for giving aid and comfort to the enemy.

Bishop Cannon deplored the incident as an exhibition of "defeatism."<sup>17</sup> Senator Caraway declared that the letter to Governor Roosevelt "lent encouragement to

<sup>16</sup>*New York Times*, July 17, 1929.

<sup>17</sup>*Ibid.*, July 23, 1929.

the criminal world" and demanded Mr. Wickersham's resignation.<sup>18</sup> Mr. Clinton Howard, chairman of the National United Committee for Law Enforcement, insisted that "the people are in no mood to be trifled with; they are not willing to have their Constitution Wickershammed into a squatter sovereignty hodge-podge which means in effect that the Constitution of the United States will operate only in those states which may approve it."<sup>19</sup>

Meantime, the Governors' Conference to which Mr. Wickersham's proposal was originally addressed dismissed it gingerly with the explanation that it was too controversial a question for Governors to handle.<sup>20</sup>

§

It was in July, 1929, that this incident took place and not until the following January that the public had any further news concerning the activities of the Wickersham commission, save that it had created a number of subcommittees, enlisted the aid of various experts and settled down to a quiet and systematic study of the American machinery of justice. Meantime, during the six months which now elapsed, the main outlines of the prohibition policy of the new Administration were becoming clear.

In a large sense this policy was based not on an attempt to employ force but on an attempt to persuade the public to accept the law as a duty of good citizenship. Mr. Hoover had urged this point with unmistakable feeling in his inaugural.

<sup>18</sup>New York *Times*, July 18, 1929.

<sup>19</sup>*Ibid.*, July 22, 1929.

<sup>20</sup>*Ibid.*, July 19, 1929.

"A large responsibility rests directly upon our citizens," he insisted. "There would be little traffic in illegal liquor if only criminals patronized it. We must awake to the fact that this patronage from large numbers of law-abiding citizens is supplying the rewards and stimulating crime. . . . No greater national service can be given by men and women of goodwill—who, I know, are not unmindful of the responsibilities of citizenship—than that they should, by their example, assist in stamping out crime and outlawry by refusing participation in and condemning all transactions with illegal liquor. Our whole system of self-government will crumble either if officials elect what laws they will enforce or citizens elect what laws they will support. The worst evil of disregard for some law is that it destroys respect for all law. For our citizens to patronize the violation of a particular law on the ground that they are opposed to it is destructive of the very basis of all that protection of life, of homes and property which they rightly claim under other laws."

To this theme the President returned frequently during his first year in office. In an address before the Associated Press in April he declared that he wished "to again reiterate that the problem of law enforcement is not alone a function or business of government. . . . Every citizen has a personal duty in it."<sup>21</sup> In May he sent a message to the National Congress of Parents and Teachers in which he deplored the prevalence of the theory "that a citizen may choose what law he will obey" and insisted that "unless such illusions can be dispelled the whole of our liberties are lost."<sup>22</sup> In December he said in his message to Congress: "We can

<sup>21</sup>New York *Times*, April 23, 1929.

<sup>22</sup>*Ibid.*, May 5, 1929.

no longer gloss over the unpleasant reality, which should be made vital in the consciousness of every citizen, that he who condones or traffics with crime, who is indifferent to it and to the punishment of the criminal, or to the lax performance of official duty, is himself the most effective agency for the breakdown of society.”<sup>23</sup>

It was a vigorous and persistent effort which Mr. Hoover made, to solve the problem of prohibition by appealing for willing compliance on the part of otherwise law-abiding citizens, but it was an effort which Mr. Hoover’s predecessors had often made before him. As early as October, 1920, in the first year of prohibition, and even before his election as President, Mr. Harding had appealed for respect for this law “as a fundamental principle of the American conscience.”<sup>24</sup>

Two years later, in his message to Congress in 1922, Mr. Harding had uttered precisely the same warning which Mr. Hoover was to repeat in his message to Congress in 1929: “Let men who are rending the moral fiber of the Republic through easy contempt for the prohibition law, because they think it restricts their personal liberty, remember that they set the example and breed a contempt for law which will ultimately destroy the Republic.”<sup>25</sup> This warning he had repeated in one of his last speeches, when he declared at Denver in June, 1923: “Ours must be a law-abiding Republic and reverence and obedience must spring from the influential and the leaders among men, as well as obedience from the humbler citizen, else the temple will collapse.”<sup>26</sup>

<sup>23</sup>Message to Congress, December 3, 1929.

<sup>24</sup>Address at Marion, Ohio, October 1, 1920.

<sup>25</sup>Message to Congress, December 8, 1922.

<sup>26</sup>Address at Denver, June 25, 1923.

Precisely to this same theme Mr. Coolidge had devoted many of his public statements when he succeeded Mr. Harding. "Enforcement of law and obedience to law, by the very nature of our institutions, are not matters of choice in this republic," he told a Governors' conference in 1923. "The complementary duty to enforcement of the law is obedience to the law."<sup>27</sup> This maxim he repeated in an address before the Woman's National Committee for Law Enforcement in April, 1924, in his speech accepting the Republican nomination in August of that year, in his inaugural in March, 1925, and in his message to Congress in the following December.<sup>28</sup> "For any part of our inhabitants to observe such parts of the Constitution as they like, while disregarding others," he said in his message a year later, "is a doctrine that would break down all protection of life and property and destroy the American system of ordered liberty."<sup>29</sup>

For nine years before Mr. Hoover entered office, Mr. Hoover's predecessors had been making the same appeal for observance of the law and giving the same warning of the consequences of widespread violation.

Proof that neither the appeals nor the warnings had found their mark was apparent in the circumstances which now compelled Mr. Hoover to repeat them.

## §

Meantime, as far as the machinery of enforcement was concerned, Mr. Hoover made it plain early in his

<sup>27</sup>Address at Washington, *New York Times*, October 21, 1923.

<sup>28</sup>*New York Times*, April 11, 1924; August 15, 1924; March 5, 1925; December 9, 1925.

<sup>29</sup>Message to Congress, December 7, 1926.

administration that there would be no sensational efforts to accomplish by force what he plainly hoped, despite the experience of his predecessors, to accomplish by persuasion.

"It is the purpose of the federal administration," he said in his address before the Associated Press in April, 1929, "systematically to strengthen its law enforcement agencies week by week, month by month, year by year, not by dramatic displays and violent attacks in order to make headlines, not by violating the law itself, through misuse of the law in its enforcement, but by steady pressure, steady weeding out of all incapable and negligent officials, no matter what their status."<sup>30</sup>

To this early plan several additions were later made, all aimed at the same goal of a sober and efficient effort. The Prohibition Bureau, under new management, announced that it would now cease "wasting time upon pitiful, picayunish, non-commercial cases" and concentrate its activities against large commercial violations.<sup>31</sup> In order to detect such violations the Bureau proposed to organize picked squads of men at strategic points throughout the country, reporting directly to Washington, and consisting of agents especially qualified "for the investigation of larger and more far-reaching conspiracies."<sup>32</sup> An effort would be made to improve the personnel of the entire service by the choice of a higher type of men. The Bureau would attempt "to train agents to act always as gentlemen, to use their brains rather than their brawn in discharging their duties. They will not use weapons except for self-defense."<sup>33</sup>

<sup>30</sup>*New York Times*, April 23, 1929.

<sup>31</sup>*Ibid.*, July 31, 1930.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.*

This was the Hoover program of enforcement. It is possible that it seemed new and promising at the time it was announced, a sharp break with the past and the prelude to a more successful future. If this was true, it was not because these various proposals were actually new but because so many different plans to enforce the law had been made at so many different times by so many different men that a long series of experiments with Mr. Hoover's plan had been forgotten.

The decision to avoid "dramatic displays" in order "to make headlines" and to substitute quiet, orderly enforcement for sensational methods had been announced for the first time not in April, 1929, but in December, 1927. "Officials of the Treasury Department have ordered the abandonment of dramatic raids with subsequent sensational advertising," it was announced on this occasion. "Quiet, orderly enforcement of the law rather than sensational efforts is the new policy of the Prohibition Bureau."<sup>34</sup>

The decision in favor of a "steady weeding out of all incapable and negligent officials" had first been announced in July, 1921, when Major Haynes came into office with a plan to rid the enforcement service of all agents who were not "of unquestioned integrity, firm conviction and patriotic purpose."<sup>35</sup> It had been announced for a second time in January, 1926, when Major Haynes gave way to General Andrews, who declared that he wanted only "the finest, cleanest-cut type of intelligent, purposeful, clever men."<sup>36</sup> It had been announced for a third time in September, 1927,

<sup>34</sup>*New York Times*, December 2, 1927.

<sup>35</sup>*Ibid.*, July 4, 1927.

<sup>36</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 1461.

when command of the enforcement service once more changed hands and General Andrews gave way to Mr. Seymour W. Lowman. For six years Mr. Lowman's predecessors had been organizing an efficient staff. Now Mr. Lowman announced that in weeding out inefficient members of this staff his arm grew tired "signing orders of dismissal."<sup>37</sup>

There were other familiar items in this new program. The plan for picked squads of trained investigators at strategic points had first been tried in June, 1921.<sup>38</sup> Formal assurance that enforcement efforts would be kept strictly within the law dated back to April, 1926, when General Andrews testified before a Senate committee that agents had been warned to use "legal methods only."<sup>39</sup> The present order to enforcement officers to use weapons only in self-defense had been anticipated by precisely the same order on October 10, 1927,<sup>40</sup> but this fact had not prevented agents from using weapons frequently in a wholly different manner.

As for the important decision to avoid "wasting time upon pitiful, picayunish, non-commercial cases" and to concentrate on "commercial manufacture and commercial transportation": over a period of some years a steady succession of statements had been issued, affirming and reaffirming this same policy.

As early as March, 1926, General Andrews had declared that he "did not want agents on small stuff" but wished them "to get at the big interests and the

<sup>37</sup>New York Times, September 10, 1927.

<sup>38</sup>Associated Press dispatch, Washington, June 17, 1921.

<sup>39</sup>Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 1433.

<sup>40</sup>New York Times, October 11, 1927.

sources of supply.”<sup>41</sup> Still earlier, in December, 1925, Secretary Mellon announced that the Prohibition Bureau would “concentrate its efforts against the sources of supply of illegitimate alcoholic beverages and against the organized traffic.”<sup>42</sup> Two years before this, in October, 1923, Major Haynes deplored a policy of wasting time on anything save “the larger conspiracy violations and border problems.”<sup>43</sup> As early as January, 1921, on the first anniversary of prohibition, the Commissioner of Internal Revenue had insisted that for the Bureau to attempt to deal with cases involving minor violations “would be an unreasonable undertaking.”<sup>44</sup>

This was the background of the enforcement program which now appeared in 1929. If the various plans which it proposed had all been used before, and had all achieved so little that by this time the public had forgotten they were tried, it was not because these plans lacked merit as ideas. The trouble was that they had been fatally handicapped in practice by the performance of men in public office, by lack of funds and by opposition to the law.

Like Mr. Hoover’s appeal for observance of the law, Mr. Hoover’s plan for enforcement of the law had its roots deep in the unsuccessful experience of nine years’ effort.

## §

It was on January 13, 1930, in the tenth month of the new Administration, that Mr. Wickersham’s Law Enforcement Commission reappeared as a factor in the

<sup>41</sup>*New York Times*, March 12, 1926.

<sup>42</sup>*Ibid.*, December 11, 1925.

<sup>43</sup>*Ibid.*, October 14, 1923.

<sup>44</sup>*Ibid.*, January 16, 1921.

situation, with a formal report submitted to the President and in turn submitted by the President to Congress. This report mirrored the interest which its chairman had shown in the problem of prohibition during the summer of the previous year. Though the commission now had "all law" as its field of inquiry, its first report dealt with enforcement of the Volstead Act to the exclusion of all other questions.

There were four proposals in this first report. The commission recommended a codification of the various prohibition statutes which had been enacted over a period of forty years. It urged the importance of enacting new legislation to reënforce the padlock provisions of the Volstead Act, since experience had shown that these provisions could be easily evaded. It recommended that in the interest of efficient enforcement of the law the Prohibition Bureau be transferred from the Treasury Department to the Department of Justice.

This was the same proposal which had first been recommended more than ten years before this time, in June, 1919, by the Secretary of the Treasury;<sup>45</sup> recommended again in 1920 by another Secretary of the Treasury; recommended for a third time in 1924 by the senior circuit judges of the country; and consistently opposed through these years by the most active friends of prohibition. To transfer the Prohibition Bureau to the Department of Justice, the Anti-Saloon League had insisted, would be to jeopardize the whole experiment with national prohibition "by creating more opportunities to shift responsibility and to pass the buck."<sup>46</sup> If the Anti-Saloon League had subsequently changed

<sup>45</sup>Chapter V, *supra*.

<sup>46</sup>New York *Times*, December 1, 1924; also November 28, 1924; May 29, 1921; April 5, 1921.

its mind it was presumably because it was now prepared to accept a change which pegged the hope of enforcement on a new objective.

Over these first three proposals, when they appeared in the report of the Wickersham commission, there was little disagreement. The fourth proposal, however, encountered opposition. This was the plan for a change in the law to permit "casual or slight violations" to be handled in the courts without trial by jury.

It was natural that the commission should have found some special interest in this phase of the question of enforcement, not only because ten of its eleven members were either judges or lawyers, but because the problem of congestion in the courts had stood out conspicuously since the first year of prohibition.<sup>47</sup> Now, in the tenth year, there was no sign of a let-up in prohibition cases. On the contrary, the number of criminal prosecutions begun by the federal government had reached a new all-time high at 56,786 during Mr. Hoover's first year in office.<sup>48</sup> At the end of this year, 18,690 cases were still listed as unfinished business.<sup>49</sup> Those which were settled had been settled principally by pleas of guilty. Less than 7 per cent of these cases had come to trial.<sup>50</sup> Bargain day was still the accepted method of disposing of prohibition in the courts.

As might have been anticipated, the condition of court calendars varied substantially in different judicial districts. By use of the bargain day method or by virtue

<sup>47</sup>Chapter III, *supra*.

<sup>48</sup>*Report of the Attorney General of the United States*, fiscal year ended June 30, 1929, p. 29.

<sup>49</sup>*Ibid.*

<sup>50</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 70.

of a smaller number of cases, some courts had managed to keep their dockets clear. In October, 1929, approximately one month before the Wickersham commission filed its first report with the President, and three months before this report was submitted to Congress, the senior circuit judges had made a survey of conditions in the different courts. They had found in some circuits—the first and fourth, for example—that "business is being satisfactorily attended to." They had found in other circuits, such as the fifth and ninth, that new judges were imperatively needed.<sup>51</sup> In the opinion of the Wickersham commission, however, there were "serious objections to multiplying courts." Moreover, bargain day itself was an "unseemly process."<sup>52</sup> The commission therefore proposed a new system of trials in petty cases before United States Commissioners, based on the following plan:

- (1) If the accused person wished to plead guilty, well and good; the commissioner would sentence him.
- (2) If he did not wish to plead guilty, the commissioner would hear his case, file a report with the court, and the court (still without benefit of jury) would render a verdict.
- (3) If, meantime, the accused person chose to take exception to the report of the commissioner, he could do so by demanding (within three days' time) a trial by jury.
- (4) In this case the district attorney could elect whether to go to trial on a minor offense or to start the case all over by accusing the defendant of a grave felony.

<sup>51</sup>New York *Times*, October 7, 1929.

<sup>52</sup>First report to the President, New York *Times*, January 14, 1930.

It was obvious that this plan placed wide powers of discretion in the hands of the district attorney. In effect, it gave him a club with which to persuade the defendant to acquiesce in the denial of a trial by jury. Whether this proposal was sound, whether it was more seemly or less seemly than the institution known as bargain day, whether the plan would relieve congestion in the courts or actually increase it, by creating a new system which might entail not one hearing but two or even three before a case was settled: these were questions destined to be debated for some months by the Wickersham commission and various competent and eager critics.<sup>53</sup>

## §

It was the plan for trials without jury which captured the headlines in the daily press and rapidly became identified in the public's mind as the program of the Wickersham commission. This was inevitable, since the plan was the one substantial change in existing law which the commission had chosen to recommend. Yet it is curious that emphasis on this one point should have managed so completely to obscure another section of this first report which dealt with more fundamental problems than punishment for "casual or slight violations." The boldest section of the report, in fact, seems on the whole to have been the section which attracted least attention, possibly because it failed to carry any recommendation to the President.

<sup>53</sup>Cf. in defense of the plan, Mr. Wickersham, *New York Times*, January 16 and 23, 1930; in criticism, Howard Lee McBain, *New York World*, January 18, 1930; Senator Robert F. Wagner, *Congressional Record*, 71st Congress, 2d Session, pp. 3129-3132.

In a brief passage of four hundred and fifty words the Wickersham commission bluntly raised two formidable questions which it called "observance" and "enforcement."

Under "observance" the commission pointed out that the problem of enforcing prohibition in the United States could not be separated from "the large question of the views and habits of the American people with respect to private judgment as to statutes and regulations affecting their conduct." It was important to note "the divergences of attitude in different sections of the country" regarding prohibition. It was important to note the tradition of a "right of revolution" against laws attempting to regulate standards of private conduct. It was important to remember that majorities or large minorities of the American people had frequently chosen to disobey laws of which they disapproved: "We must not forget the many historical examples of large-scale public disregard of laws in our past."

Meantime, under "enforcement," the commission frankly confessed that the authority of the federal government had failed to keep pace with its responsibilities. Nine years of prohibition had developed "a staggering number of what might be called focal points of infection." To deal with a problem "of this size and spread," the government could draw only "on a portion of the personnel of three federal services, whose staffs aggregate about 23,000. Approximately one tenth of this number is in the investigative section of the prohibition unit. Of the remaining 20,000, only a small proportion of the personnel is available for actual preventive and investigative work. The remainder is engaged in work far different from prohibition." To the commission the enormous gap between the responsibili-

ties of the government and its small staff of 2,300 agents seemed too obvious for comment. "These figures," the commission said, "speak for themselves."

For a moment, the country was challenged to face the fact that if the appeals of three Presidents for loyal observance of the law had fallen on barren ground it was because of a deep-rooted conviction of the American people concerning private judgment of laws governing their private conduct and the sharp "divergences of attitude in different sections" regarding prohibition. The country was challenged to face the fact that if no agency existed powerful enough to overrule such opposition as was inherent in these sources, it was because no President and no Congress had been willing to go beyond a policy of quiet, orderly enforcement and accept responsibility for creating such an agency.

At this point, however, the commission stopped abruptly, followed the logic of its own argument no further, and turned its attention to the problem of deciding whether bargain days or trials before federal commissioners promised a better way of imposing sentences for casual violations. Having recognized that the attitude of the public was a fundamental factor in the enforcement of the law, and having recognized the total inadequacy of existing federal agencies of investigation and prosecution, the commission made no recommendations whatever on either of these points.

The one new proposal which it made was concerned not with the large problems of "observance" and "enforcement," but with the small problem of handling petty cases in the courts.

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## CHAPTER XI

### The Appeal to the States

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THE Wickersham commission avoided writing finis in its first report. Such modest plans as it proposed had been suggested, the commission said, without prejudice to "any ultimate program which we may have to recommend." Meantime, the question which confronted the Hoover Administration in its second year was how to enforce a law which failed to take cognizance of "divergences of attitude in different sections of the country," if these divergences continued to exist despite all efforts to end them by persuasion.

This was, and always had been, the essence of the problem. Divergences of attitude had been present from the start. The pattern of state legislation on the question of intoxicating liquor was not uniform, or nearly uniform, when the Eighteenth Amendment took effect. It was as variegated as Joseph's coat of many colors. At one extreme stood a group of agrarian states which had adopted bone-dry prohibition laws. At the opposite extreme stood a group of industrial states which had adopted no prohibition laws whatever. Between these two extremes stood a third group of states, some agrarian, some industrial, which still legalized the possession and the use of intoxicating liquor in certain forms but regulated its manufacture, its sale, and its

transportation in accordance with those widely varying local standards of which the Wickersham commission took note in 1930. It was into this medley of states with bone-dry prohibition laws, states with no prohibition laws, and states with prohibition laws reflecting a sharp disagreement in methods between different communities that the Eighteenth Amendment introduced a universal and uncompromising standard.

Marking time during its second year, pending a further report from the Wickersham commission, the Hoover Administration faced once more the problem of enforcing this standard realistically in all sections of the country.

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In its first report the Wickersham commission had described the problem of enforcement as a question of dealing effectively with "a staggering number" of "focal points of infection." If the commission had failed to amplify this comment, and thereby to suggest the type of machinery which might reasonably be expected to enforce the law, there were reports available from other official sources which cast some light upon this cryptic statement.

Unquestionably the commonest focal point of infection in 1930, and the most persistent, was the illicit still. Other sources of supply continued to feed the traffic in intoxicating liquor. Smuggling was still a serious enough problem for the Secretary of the Treasury to propose in January, 1930, simultaneously with publication of the Wickersham report, that a military guard be mounted on the Canadian frontier and the whole border closed to travel "except at points of entry

designated by the President.”<sup>1</sup> Industrial alcohol was enough of a problem for the Prohibition Bureau to report that lack of power to compel holders of permits to open their books “makes it almost a superhuman task to detect them in violations.”<sup>2</sup> On the whole, however, industrial alcohol and smuggled liquor were now definitely minor factors. It was the illicit still which had unmistakably become the chief problem of enforcement.

As early as 1926 Congress and the Coolidge Administration had been warned that such a development was altogether likely. Testifying before a committee of the Senate at that time, General Andrews had described illicit stills as the one infallible source of production: “Where you cut off a source of supply of another nature, the moonshine wells up to fill the gap. . . . The old law of supply and demand carries in the case of bootleg liquor the same as in the case of any other merchandise.”<sup>3</sup>

Subsequent events had borne out the accuracy of this prediction. During the latter half of 1926 and throughout 1927 the problem of the illicit still steadily assumed a place of more importance in the government’s communiqués. In 1928 Dr. James M. Doran, by this time in charge of the Prohibition Bureau, described illicit distilling as “the major problem of enforcement.”<sup>4</sup> In 1929 officials of the Bureau reported that 35,200 stills and distilleries had been seized during the previous year, together with twenty-six million gallons of mash, and suggested that “any estimate as

<sup>1</sup>Report to the President, *New York Times*, January 14, 1930.

<sup>2</sup>*Industrial Alcohol*, United States Treasury Department, 1930, p. 25.

<sup>3</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 449.

<sup>4</sup>*New York Times*, December 27, 1928.

to what percentage of all illicit stills in operation is represented by the number seized would be sheer conjecture.”<sup>5</sup>

By this time, approximately the time when the Hoover Administration entered office, the flow of liquor from illicit stills was in full swing, and during Mr. Hoover’s first year nothing stopped it. On the contrary, the Prohibition Bureau reported that the production of distilled liquor steadily expanded. “There seems to be a constant growth in this production in the most modern type of plants,” said the Commissioner of Prohibition at the end of the first year of the new Administration. “The use of corn sugar in the illicit manufacture of alcohol is causing us grave concern.”<sup>6</sup>

Production of corn sugar had increased from 152,000,000 pounds in 1921 to 960,000,000 pounds in 1929. There was no way of explaining this enormous increase, in the opinion of the Prohibition Bureau, except on the theory that the great bulk of it had gone into manufacture of illicit liquor. “For every gallon of industrial alcohol diverted,” said Dr. Doran in January, 1930, “there are at least seven or eight gallons of high-proof alcohol produced illicitly from corn sugar and put on the bootleg market in the form of alcohol, gin, and alleged imported whisky. The corn-sugar racket now surpasses all others in the field of operation of the bootlegger.”<sup>7</sup>

During the same year which the Wickersham commission had devoted to a study of ways of handling minor violations in the courts, Dr. Doran’s agents had seized 27,336 stills, of which 3,434 were “not small pot

<sup>5</sup>New York Times, January 5, 1929.

<sup>6</sup>Ibid., January 10, 1930.

<sup>7</sup>Ibid., January 18, 1930.

stills, but big columns, costing anywhere from \$5,000 to \$50,000 to build," constructed by expert chemists and capable in some cases of producing from 500 to 2,000 gallons of alcohol a day.<sup>8</sup>

One indication of the importance which this problem had now assumed is apparent in the fact that three hundred stills with a capacity of 2,000 gallons could produce more hard liquor than the United States consumed before the adoption of the Eighteenth Amendment.

§

There were various reasons, all easily identified, why illicit stills should have come to the front in these later years as the chief problem in enforcement.

In the first place, this method of production was relatively simple, since it involved no effort to divert industrial alcohol from manufacturers who were under bond, but merely required the purchase of a common article in the open market. In the second place, it was relatively safe, particularly when it used corn sugar, since the distillation of alcohol from corn sugar produced almost no odor and left no mash. In the third place, it was highly economical, since a hundred pounds of corn sugar could be purchased in the market for \$5. In the fourth place, as Dr. Doran pointed out, alcohol produced in this manner in a modern plant was "of the highest type and as good as that manufactured legally."<sup>9</sup>

It is not strange that in these circumstances corn sugar distillation should have prospered. The very advantages of this method, from the point of view of the

<sup>8</sup>New York *Times*, January 10 and 23, 1930.

<sup>9</sup>*Ibid.*, January 10, 1930.

bootlegger, constituted its difficulties from the point of view of the enforcement agent. Using a product readily obtainable and not easily detected when it was put to an illicit use, the bootlegger could manufacture a high standard of alcohol at an exceedingly low cost for sale in a market which was prepared to pay high prices. The risks involved in this enterprise were negligible. Its profits were enormous.

It was the clearest result of this development in the economics of an illegal liquor traffic that it definitely put an end to the theory that the law could be enforced with a compact staff of a few thousand men in Washington and a modest amount of assistance from the states.

If the chief source of illegal liquor had been industrial alcohol, it would have been possible to deal with this source effectively by putting an agent in every factory, every wholesale house, and every retail store where industrial alcohol was bought or sold. Such an effort would have required a much larger staff of agents than the government had ever had. It would have required a much more honest staff of agents than the government had ever had. It would also have required more autocratic powers of control over American industry than Congress had been willing to lodge in the Prohibition Bureau. Nevertheless, the main problem of enforcement in this case would have been limited to the task of maintaining an effective watch over a known number of points at which alcohol might be diverted to illegal purposes.

Similarly, if the chief source of supply of the bootlegger had been liquor smuggled across the borders, the problem of enforcement would have required more thorough measures than an occasional series of breath-

less drives, but it would at least have been a problem localized in a long strip of seacoast and of border.

The problem of illicit stills, however, was neither localized in one section of the country nor confined to a relatively small number of industries. It was a problem as broad as the country itself and as limitless as its three million square miles of territory. To expect the federal government to solve this problem with the staff of 2,300 agents which the Wickersham commission counted for the President in January, 1930, would have been to expect the impossible. If these agents had done nothing but search the country for illicit stills, each agent would have had 1,316 square miles of territory to police, twenty-four hours of the day and night. Meantime, to expect the states to solve the problem as a mere by-product of the administration of ordinary local laws would have been to overestimate the strength of state enforcement agencies.

For while the states had many more police officers than the federal government—a total of approximately 175,000 marshals, constables, sheriffs, and policemen in 1930<sup>10</sup>—the responsibilities of these officers included the enforcement not of one law but of many laws. An increasingly large part of the police force of every city was assigned exclusively to the enforcement of traffic regulations. No contribution to the effort of the federal government could reasonably have been expected of these officers. It was idle to suppose that a policeman on duty at a street corner from eight in the morning until six at night could help enforce the Volstead Act. There were other policemen, constables, and sheriffs not so narrowly restricted in their movements. These officers,

<sup>10</sup>Assistant Attorney General Youngquist, *New York Times*, August 29, 1930.

however, were not local prohibition agents. They were general officers of the law, charged with the execution of a thousand duties which varied from the protection of jewelry stores against night robbery to the policing of crowds at baseball games and the prevention of thefts of motor cars to the service of warrants on citizens who failed to pay their paving bills.

The states and municipalities were frugal in their law enforcement. They had never chosen to employ more officers than they could use. They had chosen, instead, to starve their police departments in the interest of low taxes. In these circumstances, there were few peace officers who found themselves at liberty to give their whole time to detecting violations of the Eighteenth Amendment. It was obviously true in many cases that local police officers discovered violations of the Eighteenth Amendment only when they stumbled upon such violations in pursuance of other duties.

There was one way, and in reality only one way, to make an effective search of three million square miles of territory in order to detect and to destroy illicit stills which might lurk in any tenement basement or any deserted strip of countryside. That way was to organize a force of federal or state police specifically devoted to this ambitious task and adequate enough in personnel to offer reasonable hope of its accomplishment.

§

It had always been the theory of the federal government that responsibility for local enforcement of the Volstead Act properly rested on the states. The federal government, to be sure, had conducted an enormous number of local raids. It had conducted so many raids

that by the end of 1929 it had arrested a total of 550,307 people.<sup>11</sup> These arrests, however, admittedly apprehended only a small fraction of those who were guilty of violating the law. "We do not begin to arrest all that are guilty," General Andrews had told a committee of the Senate in 1926. "We cannot."<sup>12</sup> The federal government had always been involved in a certain amount of local police work, but never deeply enough involved to enforce the law effectively. Such responsibilities as it had accepted in this field it was plainly reluctant to expand.

There were two chief reasons for this reluctance. In the first place, various spokesmen of the government had long insisted that a policy of too active interference from Washington in the police work of the states would be certain to result in confusion and resentment. "I venture to say," wrote President Harding in 1923, "that if by reason of the refusal or failure of any state to discharge its proper duty in such connection the federal government is at length compelled to enter upon the territory and jurisdiction of the state and to set up those police and judicial authorities which would be required, the most difficult and trying situations would inevitably arise. More or less conflict between state and federal authorities would seem unavoidable in such circumstances. The impression would be created that the federal government was assuming to interfere with the functions of the states and the distressing results that would ensue readily suggest themselves."<sup>13</sup>

<sup>11</sup>*Statistics Concerning Intoxicating Liquors*, United States Treasury Department, 1930, p. 64.

<sup>12</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary*, 69th Congress, 1st Session, p. 57. Cf. Chapter VI, *supra*.

<sup>13</sup>*New York Times*, May 17, 1923.

In the second place, any such activity would be certain, as Mr. Harding also pointed out,<sup>14</sup> to involve the federal government in enormous expense inevitably requiring the imposition of new taxes. How large an item this expense would be, Mr. Harding did not attempt to estimate. Five years later, testifying before a committee of the House of Representatives, the federal Commissioner of Prohibition set the figure at \$300,000,000.<sup>15</sup> This would have multiplied the appropriation of the Prohibition Bureau approximately by twenty and increased its staff accordingly. Even with this vastly increased expenditure, however, there would have been no slack in the enforcement service. If the purpose of giving the Prohibition Bureau \$300,000,000 was to enable it to make a serious effort to solve what had now become its major problem, the problem of searching the country for illicit stills, each enforcement agent would still have been left with sixty-six square miles to cover.

In these circumstances, reluctant to accept either the heavy cost of an adventure with a federal police force or the political consequences which such an adventure might entail, the federal government had insisted from the outset that its own responsibilities were limited and that the duty of supplying an effective staff of agents for local police work was clearly imposed on the states by that clause in the Eighteenth Amendment which gave the states "concurrent power to enforce."

On this point, however, the government encountered no unanimity of opinion. There were, and had been for some years, two sharply different theories concerning the meaning of "concurrent power."

<sup>14</sup>Address at Denver, June 25, 1923.

<sup>15</sup>Chapter X, *supra*.

## §

As an earlier chapter has pointed out, no mention of concurrent power occurred in the Eighteenth Amendment as originally adopted by the Senate.<sup>16</sup> The phrase appeared for the first time when the Amendment reached the House. On this occasion the chairman of the House Judiciary Committee undertook to explain why the language of the Senate's resolution had been changed.

Most of the members of the committee, he said, felt that the resolution should contain a specific reservation to the states "of power to enforce their prohibition laws." Accordingly, the resolution had been amended to include concurrent power. "I believe, regardless of our division on the wet and dry question," said the chairman of the Judiciary Committee, "every member will agree with us that this is a wise and proper amendment. Nobody desires that the federal Congress shall take away from the various states the right to enforce the prohibition laws of those states. If we do not adopt this amendment from the committee there might be a fight in Congress every two years as to whether the states should be given the right to help enforce this proposed article of the Constitution. Because, as I see it, after the states have delegated to the federal Congress power to do a certain thing, for instance, to stop the manufacture and sale of alcoholic liquors for beverage purposes, the question is whether the state has not turned over to the federal Congress the exclusive right to enforce it."<sup>17</sup>

Stated in this form, the plain purpose of the clause

<sup>16</sup>Chapter II, *supra*.

<sup>17</sup>*Congressional Record*, 65th Congress, 2d Session, p. 423.

giving the states concurrent power was (1) to make sure that the states would not lose power to enforce their own prohibition laws and (2) to avoid "a fight in Congress every two years" over the "right" of the states to help the federal government enforce the Eighteenth Amendment.

This was as far as the Judiciary Committee went, and the House itself showed no disposition to push the matter further. During the whole debate on the adoption of the Eighteenth Amendment there was no discussion of the meaning of concurrent power. The House was plainly ready to accept without question the assurance of its committee that the states needed this added protection of their right to enforce their own prohibition laws. It was plainly ready to accept, also without question, the assurance of its committee that the states would be eager to help the federal government enforce the Eighteenth Amendment and that the result would be to free Congress of an enormous burden.

As the chairman of the committee explained the advantages of this plan: "We do not want ten thousand federal officers, with all the expense of salaries, going over the country enforcing these laws when the states have their own officers to do so and are willing to do so."<sup>18</sup> This explanation satisfied the House, though it left unanswered the question of what would happen if some of the states or all of the states proved in fact not "willing to do so."

Apparently, in this case, full responsibility for enforcement would remain with Congress. There was no suggestion in the statement of the chairman of the Judiciary Committee, and no suggestion on the floor of

<sup>18</sup>*Congressional Record*, 65th Congress, 2d Session, p. 424. Cf. Chapter II, *supra*.

the House itself, that this proposal for concurrent power imposed upon the states any new responsibility which they did not have before. The plain purpose of the concurrent clause, in the form in which it was offered and expounded in the House, was to protect the states in the enforcement of their own legislation and to pave the way for the prompt acceptance by the federal government of such assistance in the enforcement of the Eighteenth Amendment as the states chose "willingly" to offer.

## §

Nevertheless, though this was the interpretation given to concurrent power in the House, and though no different interpretation could possibly have been intended in the Senate, since the concurrent clause had not been written when the Senate debated prohibition, it was not long before a new and more ambitious interpretation was placed upon this section of the Eighteenth Amendment. According to this later theory, the original purpose of the House was not the decisive factor. The Eighteenth Amendment gave the states concurrent power. In so doing, it made the states coequal partners with the federal government and invested them with coequal responsibility for enforcement of the law, both legally and morally.

If there was comparatively little discussion of this theory in the early days of prohibition, it was for one reason because the importance of effective state coöperation had not been appreciated at full value. The friends of the Eighteenth Amendment had been confident that the law would be obeyed. They had foreseen no widespread and determined opposition on the part of otherwise law-abiding citizens. They had predicted that the

law could be enforced without difficulty on an annual appropriation of five million dollars.<sup>19</sup> There was little need for more millions from the states in such a forecast. As time passed, however, as opposition to the law persisted, as the full scope of the problem of enforcement came gradually to be realized and as the federal government continued to plod along with a staff of agents wholly disproportionate to the task in hand, the theory that the states were legally and morally bound to share the heavy burden of enforcement steadily acquired emphasis.

In the years from 1925 to 1930 this theory of the states as coequal partners of the federal government was argued at length on many occasions by many friends of prohibition, notably by Mr. Wheeler and Mr. McAdoo, but argued by no one with more persistence and more vigor than by Senator Borah.

To Mr. Borah it seemed unmistakably clear that the concurrent clause of the Eighteenth Amendment imposed upon the states a responsibility which they could not dodge with honor. "Under this section the obligation laid upon the state within its jurisdiction is no different and no less than that laid upon Congress or the federal government. . . . The Constitution of the United States affirmatively prohibits certain things and then authorizes both Congress and the states to enforce the Constitution. If the will of the people means anything, as embodied in the national Constitution, neither Congress nor the states can disregard this command thus embodied in the Constitution. Both are under legal and moral obligation to make the will of the people as expressed in the Constitution effective."<sup>20</sup>

<sup>19</sup>Chapter III, *supra*.

<sup>20</sup>New York Times, July 28, 1929.

On this point the opinion of the Supreme Court in a celebrated case arising under the Eighteenth Amendment, *United States vs. Lanza*,<sup>21</sup> seemed to Mr. Borah entirely reassuring. For while the court had held in this case that the state is free to enact prohibition laws, "the court nowhere intimated," insisted Mr. Borah, "that the state is free to disregard the national Constitution and to refuse to enact laws. The state is free to do anything it may choose in harmony with the national Constitution, but it is not free to act contrary to the national Constitution, and it acts contrary to it when it declines or refuses to enact laws to make it effective."<sup>22</sup>

In short, the failure of the states to adopt laws in support of the Eighteenth Amendment was as patently illegal and as morally reprehensible as the adoption of a law which openly defied the Amendment. "When a provision of the Constitution is adopted, the state cannot assume an attitude of indifference toward it or an attitude of indifference toward its maintenance. The state is an integral part of the Union, it receives vast privileges under the Constitution and owes an active duty in return. It is bound to be interested in maintaining the federal Union. It is bound to be concerned in seeing that the federal Union is a going concern and, therefore, interested in supporting and maintaining the Constitution."<sup>23</sup>

## §

If this theory of the Eighteenth Amendment was convincing to the friends of prohibition, and if the

<sup>21</sup>260 U. S. 377 (1922).

<sup>22</sup>New York Times, July 28, 1929.

<sup>23</sup>Ibid.

responsibility of the states under the concurrent clause seemed unequivocally clear, the theory did not lack able and aggressive critics. Mr. Borah's interpretation of the concurrent clause was challenged by the Voluntary Committee of Lawyers in New York.<sup>24</sup> It was challenged by Howard Lee McBain, Ruggles Professor of Law at Columbia University.<sup>25</sup> It was challenged, vigorously and persistently, by Governor Ritchie of Maryland.<sup>26</sup>

None of these critics of Mr. Borah's theory attempted to dispute the obvious fact that the Eighteenth Amendment imposed the duty of obedience on every citizen of the country in whatever state he lived. Their quarrel was with Mr. Borah's conception of the duty of the states themselves. Nothing in the Eighteenth Amendment, they insisted, had imposed upon the state governments any responsibility, either legal or moral, to assist the federal government in the enforcement of this legislation.

In support of this theory Governor Ritchie turned back to the original debate on the Eighteenth Amendment in the House of Representatives. On this occasion the chairman of the Judiciary Committee had interpreted the concurrent clause as a protection to the states in the enforcement of their own prohibition laws. The House had accepted this interpretation. The Supreme Court, insisted Governor Ritchie, had taken the same view. For in the case of *United States vs. Lanza*, discussed by Senator Borah, the Supreme Court had held:

<sup>24</sup>*New York Times*, December 16, 1929.

<sup>25</sup>*Prohibition: Legal and Illegal*, pp. 27-31.

<sup>26</sup>*New York Times*, February 6, 1927; August 15, 1929; August 16, 1929; December 15, 1929.

To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the Amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded.

To this the court had added the following comment concerning the power of the states to write prohibition laws:

Such laws derive their force, as do all new ones consistent with it, not from this Amendment but from power originally belonging to the states, preserved to them by the Tenth Amendment and now relieved from the restriction heretofore arising out of the federal Constitution.

In other words, the court had held that the states derived no power from the Eighteenth Amendment except perhaps the power to act upon interstate and foreign liquor, a power which had already been granted to them by act of Congress some years before the Amendment was proposed. "The result is unmistakable and uncontrovertible," insisted Governor Ritchie. "Inasmuch as the states do not derive their power to pass state enforcement laws from the concurrent clause of the Eighteenth Amendment, it follows, of course, that the Eighteenth Amendment imposes no duty whatever

on the states to pass such laws. The Amendment simply preserves to the states the power in this respect which they already had. It grants them no new power, and since it grants them no power of any kind obviously it imposes no duty of any kind.”<sup>27</sup>

With this view Mr. McBain concurred: “It is curious that so little public attention has been given to this pronouncement by the court. It is of the highest importance. For manifestly if the states derive from the Amendment no power to enact prohibition laws, they are of a certainty under no obligation, moral or legal, to enact such laws because of the Amendment. . . . They are undoubtedly absolved from all responsibility in respect to its enforcement by the high priests of American law. Whatever may be the widespread notion to the contrary, this is the law of the Constitution as expounded by its final determiner, the Supreme Court of the United States.”<sup>28</sup>

§

In Senator Borah’s theory of concurrent power and Governor Ritchie’s interpretation of the same clause there was a wide discrepancy in point of view, reflecting a disagreement over the merits of prohibition as well as over the rulings of the Supreme Court and the theory of the Constitution. Meantime, whether it was the duty of the states to match the federal government man for man and dollar for dollar in the enforcement of the law, or whether no semblance of legal or moral responsibility rested on the states, this much was certain: the federal government had no power to compel the states to take

<sup>27</sup>Address at Boston, December 10, 1929.

<sup>28</sup>*Prohibition: Legal and Illegal*, pp. 30-31.

action against their will. As Mr. Borah himself pointed out, "We cannot mandamus a state to pass a state law, to execute or enforce a law."<sup>29</sup> The states were sovereign bodies. Short of the application of armed force, there was no way in which to enlist their coöperation in this enterprise save through the power of persuasion.

The attempt to exercise this power of persuasion had begun at an extremely early date. For obvious reasons, including the important element of cost and the equally important element of taxes, successive Presidents had chosen to adopt the same interpretation of the law as that championed by Mr. Borah. As early as December, 1922, Mr. Harding made the first formal plea on behalf of a President of the United States for more effective assistance by the states. Prohibition had not been successfully enforced. There were "conditions relating to its enforcement which savor of nation-wide scandal." It was important that the states contribute more to this experiment than they had contributed to date. "I purpose to invite the Governors of the states and territories, at an early opportunity, to a conference with the federal executive authority."<sup>30</sup>

From this point forward the appeal for assistance by the states had been repeated by successive Presidents from year to year as regularly as the plea for loyal observance of the law on the part of private citizens. In May, 1923, Mr. Harding urged the states "fully and literally" to assume "their part of the responsibility of maintaining the Constitution."<sup>31</sup> In June of the same year he deplored "a growing laxity on the part of the states" and appealed for "real coöperation between na-

<sup>29</sup>New York *Times*, July 28, 1929.

<sup>30</sup>Message to Congress, December 8, 1922.

<sup>31</sup>New York *Times*, May 17, 1923.

tional and state authority.”<sup>32</sup> In October Mr. Coolidge took up the burden of Mr. Harding’s appeal and urged the states to come to the aid of the federal government by using the machinery of local government “to the full extent of its capacity to secure the enforcement of the law.”<sup>33</sup>

Time and again, during his five and a half years in office, this invocation to the states appeared and reappeared in Mr. Coolidge’s public statements on the problem of prohibition in the United States. To this same theme he returned in his message to Congress in December, 1923; in his Memorial Day address at Arlington in May, 1925; in his message to Congress in December, 1925; in his message to Congress in December, 1926; in his message to Congress in December, 1927; in his message to Congress in December, 1928, three months before the inauguration of the Hoover Administration.

By this time, certainly, the appeal for effective state assistance had been stated so frequently and so earnestly that it must have rung in the ears of every state legislature in the country. “Vigilance on the part of local governments would render enforcement efforts much more successful.”<sup>34</sup> “Local authorities, which always had been mainly responsible for the enforcement of law in relation to intoxicating liquor, ought not to seek evasion by attempting to shift the burden wholly upon the federal agencies.”<sup>35</sup> “The federal government . . . is entitled to the active coöperation of the states.”<sup>36</sup>

<sup>32</sup>New York Times, June 26, 1923.

<sup>33</sup>Ibid., October 21, 1923.

<sup>34</sup>Message to Congress, December 6, 1927.

<sup>35</sup>Ibid., December 7, 1926.

<sup>36</sup>Ibid., December 3, 1928.

"We need their active and energetic coöperation, the vigilant action of their police and the jurisdiction of their courts to assist in enforcement."<sup>37</sup>

## §

Tireless as were these efforts to stimulate the states into aggressive action, the net result of eight years of earnest appeals from Washington was an appropriation by the states of \$698,855 for enforcement in 1927,<sup>38</sup> the latest year for which figures of the Census Bureau were available when the Hoover Administration entered office.

At this point the states were contributing to the experiment with national prohibition less than a penny a year for each of their inhabitants. They were devoting to Mr. Borah's theory of their heavy responsibilities under the concurrent clause enough funds to give each state an average of five prohibition agents at a salary of \$3,000. They were spending for the enforcement of the Eighteenth Amendment approximately one-eighth of the sum they were spending for the enforcement of their own fish and game laws.<sup>39</sup>

For the complete failure of the states to give the federal government the effective assistance for which it had so often asked, their indifference to a long series of appeals from Washington and their reluctance to reply to these appeals with money for enforcement, the Prohibition Bureau advanced an explanation in June, 1930. In a pamphlet bearing the seal of the Treasury

<sup>37</sup>Message to Congress, December 8, 1925.

<sup>38</sup>Chapter VIII, *supra*.

<sup>39</sup>*Financial Statistics of the States, 1927*, Bureau of the Census, pp. 80-83.

Department and entitled *State Coöperation in the Enforcement of National Prohibition Laws*, the Bureau offered this suggestion: "To an observer the causes of this lack of coöperation are quite apparent. Unwholesome influences are at work to prevent enforcement."<sup>40</sup>

It was a familiar theme, the theme of a conspiracy to defeat the law, but in the case of the state legislatures there were obvious influences with which it failed to reckon. Merely as a matter of routine administration there was an almost inevitable tendency on the part of the states to slacken their efforts in the enforcement of state prohibition laws when the federal government entered the field of enforcement with its great prestige and its enormous income.

Something of this sort had happened many times before and in the case of many laws which antedated prohibition. Left to their own devices, to work out for themselves the solution of a problem which remained within their borders, the states had been compelled to exercise their own ingenuity and to accept responsibility for their own decisions. Once the federal government appeared upon the scene with its vast resources, it was entirely in accord with precedent that the states should feel, as Mr. Harding complained in 1923, that a kindly deus ex machina had "actually taken over the real responsibility."<sup>41</sup>

Deeper down than this, however, lay the fact that the states were now suddenly called upon to enforce a law which in most cases had never had the sanction of local legislation. If it is unquestionably true that forty-five of the forty-eight state legislative bodies ratified the

<sup>40</sup>*State Coöperation in the Enforcement of National Prohibition Laws*, United States Treasury Department, 1930, p. 7.

<sup>41</sup>Address at Denver, June 25, 1923.

Eighteenth Amendment during a period which began in the tenth month of the war and ended in the third month following the Armistice, it is also unquestionably true that most of these states had never chosen down to this point to experiment with anything as drastic as bone-dry prohibition. The method which they had followed in dealing with the familiar problem of intoxicating liquor had been to proceed cautiously in accordance with local standards and customs which varied substantially in different sections of the country.

If the legislatures of these states had subsequently failed to contribute generously to the enforcement of the Eighteenth Amendment, if they had been reluctant to create militant enforcement agencies and hesitant in resorting to their powers of taxation in order to maintain these agencies, the possibility of some such result might have been foreseen, in less extraordinary circumstances than existed when the Eighteenth Amendment was adopted, by those members of the House of Representatives who had so casually accepted the theory of willing coöperation by the states.

## §

If one fact was abundantly clear by 1930 it was the failure of the federal government, after ten years of earnest exhortation, to persuade the states to make a realistic effort to enforce prohibition in the United States. The states, with six exceptions, had been willing to enact and to retain on their statute books a quantity of legislation. They had not been willing to appropriate more than a pittance for the enforcement of this legislation.

Nevertheless, barren as were the efforts of the federal

government to enlist effective assistance by the states, it was once more to the states that the Hoover Administration turned in 1930, confronted by a new development in the problem of enforcement, the emergence of the illicit still as the dominant factor in production and the necessity of creating an army of agents adequate to police the country.

The budget for enforcement submitted to Congress precisely at this time proposed merely a nominal increase in the appropriation of the Prohibition Bureau. Nor did this budget stand alone as mute evidence that the Administration believed the vast problem of suppressing illicit stills to be a problem beyond the responsibility of the federal government. A series of statements by various heads of departments in Washington not only emphasized again, in midsummer, 1930, the importance of effective state assistance, but now made it impressively clear that without effective state assistance there would be no enforcement.

Attorney General Mitchell insisted that the federal government could not possibly go into the states to "create an enormous police force . . . such as would be necessary to measurably enforce the law if the state authorities did nothing."<sup>42</sup> The Prohibition Bureau argued in its latest brochure that failure to enforce the law could not "consistently be laid at the doors of the federal authorities," since, in the absence of state assistance, "the burden put upon the federal enforcement machinery is too heavy."<sup>43</sup> Assistant Attorney General Youngquist frankly confessed that the existing federal agencies of enforcement were "pitifully inadequate" for

<sup>42</sup>New York Times, June 27, 1930.

<sup>43</sup>*State Coöperation in the Enforcement of National Prohibition Laws*, United States Treasury Department, 1930, pp. 2, 64.

the task in hand,<sup>44</sup> though the government plainly had no intention of increasing these agencies substantially.

To a fuller extent than ever before in a decade of experiment, the federal government abdicated responsibility for the single-handed enforcement of bone-dry prohibition in the United States at the end of 1930. The problem of enforcing bone-dry prohibition now returned to the states, the great bulk of which had never had it before 1920 and certainly never enforced it once they got it.

<sup>44</sup>New York *Times*, August 29, 1930.

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## CHAPTER XII

### The Position in 1930

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WIDESPREAD disregard of the law, indifference in the state legislatures, and unwillingness on the part of the federal government to accept the entire burden of enforcement: these were the decisive factors at the end of 1930. Where the law was liked, it was obeyed. Where it was not liked, there was nothing to enforce it except the same familiar sequence of ineffective drives, of ultimatums with no force behind them, of mobilizations and remobilizations of a small staff in a few strategic spots, of padlocks picked after the key was turned, and of light fines in the courts on bargain days.

There was no good reason to suppose that this program of enforcement could succeed in reaching its objective unless some fundamental factor in the situation changed: unless a larger part of the public began willingly to obey the law, or unless the states accepted a new view of their responsibilities, or unless the federal government multiplied its own investment in the cause of national prohibition.

Without a change in one or another of these fundamental factors, the scope of the existing program of enforcement was definitely limited. A new commissioner of prohibition could reasonably hope to accomplish certain reforms in the administration of the law by his own

agents. He could reasonably hope for more success than his predecessors had achieved, in persuading his agents to remain within the law and to avoid sensational methods. He could reasonably hope to make the efforts of his Bureau quiet and orderly, so quiet and so orderly as to pass almost unnoticed. What he could not reasonably hope to do was to shut off the sources of illegal liquor with any machinery which Congress had provided for that purpose.

This much was frankly and explicitly acknowledged at the end of 1930 by officials in a position to speak for the federal government.

When Assistant Attorney General Youngquist stated that "the magnitude of the task" made the existing program of enforcement "pitifully inadequate" to achieve its goal,<sup>1</sup> he definitely dismissed the theory that the law could be enforced by a series of patient blunders into some ingenious and inexpensive solution of a stubborn problem.

When Attorney General Mitchell declared that under existing conditions the question of how much enforcement each community would have was largely "a matter of choice with the states" themselves,<sup>2</sup> he summarized the unmistakable results of ten years' effort.

When the Prohibition Bureau insisted that without effective state assistance "the burden put upon the federal enforcement machinery is too heavy,"<sup>3</sup> it brought to a sober and matter-of-fact dénouement the era of resplendent promises inaugurated by Major Haynes in 1923 when he pronounced the law triumphant over all

<sup>1</sup>New York Times, August 29, 1930.

<sup>2</sup>Ibid., June 27, 1930.

<sup>3</sup>State Coöperation in the Enforcement of National Prohibition Laws, United States Treasury Department, 1930, p. 64.

its problems and described the success of the Prohibition Bureau as "nothing short of marvelous."<sup>4</sup>

The day of miracles was over. Whatever else was possible at the end of 1930, it was not possible to believe, on the basis either of ten years' experience or of any future which responsible officials now ventured to predict, that the Prohibition Bureau could succeed in lifting itself to the top of a long hill by a series of short tugs on its own bootstraps.

§

At the end of 1930, five possible alternatives to the existing situation had been proposed. These alternatives were (1) willing compliance with the law on the part of enough people to reduce the problem of enforcement to manageable terms; (2) a realistic effort to enforce the law in the face of whatever opposition it encountered; (3) nullification of the law by deliberate failure to enforce it; (4) an effort to modify the law by some change in the Volstead Act; (5) repeal of the law and restoration of the problem to the states.

Because these alternatives existed, it did not follow that any one of them would necessarily be chosen by the American public within a reasonable period of years. There were formidable difficulties inherent in all five alternatives, from the enlistment of willing compliance at one end to repeal of the Eighteenth Amendment at the other. Unquestionably the easiest policy was to drift along. The course of this experiment had not changed substantially in a decade. Any change in its progress now required a reconciliation of conflicting views and a bold effort to overcome inertia.

What possibilities lay ahead, which one of these alter-

<sup>4</sup>New York *Times*, December 24, 1923.

natives the American people would ultimately choose, if, indeed, they should choose any, could not be foreseen at the end of 1930. Ten years' experience made it possible, however, to examine the problems involved in each alternative and to measure the progress each had made.

§

The first possible alternative to the existing situation was a fundamental change in public opinion and a willing compliance with the law on the part of people who had hitherto disobeyed it.

Such a change, of course, would promptly dispose of any problem confronting the federal government. As Mr. Coolidge had said at a conference of Governors in 1923, if the public would once stop patronizing bootleggers, "the rest would be easy."<sup>5</sup> It was an obvious comment, but it was still as much to the point in 1930 as it was in 1923. If the 98 per cent or the 99 per cent of the American public which willingly obeys laws forbidding burglary, forgery, assault, and arson should begin willingly to obey the law forbidding manufacture and sale of intoxicating liquor, there would be no prohibition problem. There would be no need to discuss enforcement plans. There would be no debate over the respective duties of the states and the federal government under the concurrent clause.

Willing compliance with the law would promptly cut the Gordian knot of prohibition. Three Presidents had found it difficult, however, to persuade the public to yield this compliance as a duty of good citizenship. Almost in identical words Mr. Hoover was still repeating

<sup>5</sup>Address in Washington, October 20, 1923. Chapter V, *supra*.

the early appeals and admonitions of his predecessors: pleading for obedience to the law as "the first duty of a citizen of a self-governing state" as Mr. Harding had pleaded for obedience to the same law in 1920 as "a fundamental principle of the American conscience"; denouncing the doctrine "that a citizen may choose what law he will obey" as Mr. Coolidge had denounced the doctrine that citizens may choose "to observe such parts of the Constitution as they like while disregarding others"; warning the country that the dogma of disobedience to a particular law was "destructive of the very basis of protection of life, of homes and property" as Mr. Coolidge had warned the country that this same dogma would "break down all protection of life and property and destroy the American system of ordered liberty."

Nothing that three Presidents had said, nothing that had been said by many other men in public life, nothing that had been argued in support of the theory that prohibition was like all other laws, equally binding upon the conscience of the American people and entitled to equal respect, had succeeded by the end of 1930 in persuading a large part of the public to accept prohibition on this basis.

Opinion among the friends of prohibition was divided. There was one school which believed with Bishop Cannon that the time had come to employ sufficient force "to convince the present rebels against prohibition that the government will suppress rebellion wherever found."<sup>6</sup> There was a second and more optimistic school which continued to believe that desperate remedies were not needed and that the American people would come in time to accept the law of their own free will, either be-

<sup>6</sup>New York *Times*, February 10, 1930.

cause they learned to appreciate its value or because they consented to obey it as good citizens.

Force of circumstance had compelled this second school to revise its estimate of time. In the early years of the Eighteenth Amendment the advocates of national prohibition had believed that the law would be obeyed so promptly that a few million dollars would be sufficient to enforce it. Gradually it had been necessary to advance the date when such obedience might reasonably be expected. In 1930 there were friends of prohibition who believed that by 1933 or by 1935 or by 1940 the public could be won over to the law; other friends who looked ahead still further. "Prohibition will be enforced if we stick to it long enough," said Mrs. Carrie Chapman Catt. "Ten years is but a little time with 100,000 years ahead."<sup>7</sup>

To those Americans who disliked and distrusted prohibition, a decade seemed ample time in which to find an answer to the question of how much support the public would give the law. To the friends of prohibition this test was unfair and a decade too brief for a real answer.

§

The second possible alternative to a policy of drift was a realistic effort to enforce the law in whatever section of the country it was disobeyed. In the opinion of the Hoover Administration, as expressed at the end of 1930, such an effort could come only from the states themselves.

If this was true, there was little difference between the first alternative and the second. The states in which the law was most widely disobeyed were obviously re-

<sup>7</sup>New York *Times*, January 25, 1930.

luctant to vote large funds with which to enforce it as long as sentiment within these states was opposed to strict enforcement. The problem of persuading the states to enforce the law, therefore, was essentially the problem of persuading the public to obey it. If a time came when 95 per cent or 85 per cent or even 75 per cent of the people in the large industrial states were won over to the cause of national prohibition, the federal government would no longer need militant assistance from the states. Until such time arrived, appeals addressed to the legislatures of these states were appeals addressed to them to override the will of their constituents.

Owing to the presence of a dry majority in Congress, the federal government was in a different position. With a three-to-one vote or a two-to-one vote in favor of prohibition in both the Senate and the House, Congress had ample power to initiate a genuine effort to enforce the law at any time it chose to act. The starting point for such an effort was plain enough. Above all else the law needed men and money.

Over a period of ten years Congress had done its best to escape this inescapable conclusion. The experiment with national prohibition had begun with an appropriation demonstrably inadequate for the purpose of enforcement. At the end of 1930 the chief spokesmen of prohibition in the Senate and the House were still as insistent as they had always been, that the right way to enforce the law was not to appropriate money to enforce it but to write more laws to be enforced: laws making the purchaser of illegal liquor equally guilty with the seller, laws adding new penalties to the penalties carried in the Jones Act, laws making it mandatory upon the courts to impose prison sentences on first offenders.

If ten years of prohibition had proved anything they

had proved the futility of such efforts. Nothing except additional confusion and a larger measure of hypocrisy had been achieved by adding more law to a law which was not enforced. If the existing federal machinery of enforcement was "pitifully inadequate" to enforce the law against sellers of illegal liquor, it was still more pitifully inadequate to enforce the law against the far more numerous purchasers of illegal liquor. If federal attorneys complained that juries would not convict under the heavy penalties carried in the Jones Act, there was no reason to suppose that they would convict more readily in case these penalties were increased. If the courts had found it impossible to dispose of prohibition cases by any other method than a series of bargain days, it was idle to call upon the courts to send every prohibition case to trial for the purpose of imposing mandatory prison sentences on those who were guilty of violations.

As far as enforcement was concerned, every alternative to the expenditure of ample funds had been tried not once but many times by the end of 1930. Laws had been added to existing laws, increasing the scope of the law to be enforced. Regulations had succeeded regulations, multiplying the responsibilities of a staff too small to carry them successfully. Drives had followed drives, in a long pursuit of the same familiar problem through a series of reincarnations at widely scattered points. Reorganizations of the Prohibition Bureau in 1921 and 1925 and 1926 and 1927 and 1930 had started out afresh five times to find some formula of enforcement sufficiently ingenious to compensate for a paralyzing lack of men and money.

If the federal government wished to enforce prohibition in the United States, ten years of experience plainly showed the way to go about it. The first step was to

organize an army of agents adequate to police the country to suppress illicit stills. The second step was to equip these agents not with more law to enforce but with more authority under existing law: with authority, as the Wickersham commission had proposed, to initiate padlock proceedings without personal service of a subpoena on the owners of the property involved; with authority, as the Prohibition Bureau had proposed, to compel business firms to open their books and to show in detail what disposition they had made of any products requiring the use of alcohol; with authority, as General Andrews had proposed, to enter private homes and to search private dwellings not only on warrants charging sale of liquor but also on suspicion of its manufacture for illegal use.

Whether the federal government would ultimately provide the authority and the machinery needed to enforce the law remained to be disclosed. At the end of 1930 Congress was still unwilling to believe that its own responsibilities went beyond halfway authority for the Prohibition Bureau, a budget of \$13,000,000 and a staff of 2,300 field agents, each covering an average area of 1,300 square miles.

§

At the opposite extreme from the proposal for militant enforcement of the law stood the proposal for its deliberate nullification. This proposal was not advocated solely in irresponsible places or by persons in irresponsible positions. There were intelligent and sober-minded men to whom nullification as a political method seemed both reasonable and opportune.

Without specifically recommending nullification in the case of prohibition, Dr. Arthur Twining Hadley,

president emeritus of Yale University, described the method in 1925 as a "safety valve which helps a self-governing community avoid the alternative between tyranny and revolution."<sup>8</sup> A similar opinion was expressed in the *Atlantic Monthly* of October, 1926, by Mr. Jerome D. Greene, who endorsed nullification of the Eighteenth Amendment and the Volstead Act on the ground that this was the traditional method by which American communities asserted their will "against the improper or unwelcome intrusion of governmental action in individual or local conduct." "This is not a counsel of lawlessness," insisted Mr. Greene, "for law rests fundamentally on public opinion; and public opinion can assert itself as effectively and rightfully in breaking as in making a law, provided it is really public opinion which is acting and not the capricious action of lawless-minded individuals."

There were other men who shared these theories. They argued that nullification was not revolution but a method of reducing political tension when it became intolerable. They argued that majorities or large minorities had chosen many times to nullify laws which lacked the sanction of public opinion in one section of the country or another; that the Fugitive Slave Law had been nullified by the people of the North; that the Reconstruction Acts had been nullified by the people of the South; that a large number of local laws, including many blue laws, had been nullified both in the North and in the South, through a gradual loss of respect resulting from a change in local standards.

Moreover, while a policy of nullification undeniably carried with it certain risks, these risks seemed to the

<sup>8</sup>Law Making and Law Enforcement, *Harper's Magazine*, November, 1925.

advocates of nullification to be negligible by comparison with the risks involved in an effort to enforce by drastic means a drastic law which ran counter to the will of large numbers of people.

"The cost of trying to compel obedience to a law which violates the consciences of a considerable minority of the people or the traditional usages and privileges of anything like a majority is usually too great," insisted Dr. Hadley. "The attempt to enforce the Fugitive Slave Law converted the misunderstandings between North and South into public menaces. The attempt to enforce the Reconstruction Acts not only resulted in abject failure but left a legacy of bitterness behind it which lasted for many years. What has proved true in large matters like these has generally held good in small ones. The efforts to enforce legislation regarding Sunday amusements, for instance, have usually produced an amount of vexation and trouble far out of proportion to any tangible results that could be expected or achieved."<sup>9</sup>

It was a consideration of these circumstances which led Dr. Hadley to describe nullification as a safety valve. Inevitably there were many men who took exception to this theory. To Senator Borah, for example, nullification was not a safety valve, not a method of enabling self-governing communities to "avoid the alternative between tyranny and revolution," but a "slinking, silent, cowardly sapping of the very foundation of all order, all dignity, all government—the furtive, evasive betrayal of a nation."<sup>10</sup>

There was a sharp difference of opinion here, but a

<sup>9</sup>Law Making and Law Enforcement, *Harper's Magazine*, November, 1925.

<sup>10</sup>New York *Times*, July 19, 1926.

difference of opinion over a philosophy of action rather than a plan of action. No organized movement with nullification as its objective had made its appearance in American politics by the end of 1930. No league and no association opposed to the Eighteenth Amendment advocated deliberate disobedience to the law while it remained in force. No bloc in Congress had proposed to repeal the Volstead Act without substituting some other legislation in its place.

Such nullification as had appeared during ten years of prohibition consisted of individual disobedience of the law and unwillingness on the part of Congress to enforce it.

§

Like the proposal to nullify the law, the proposal to modify it was based on the theory that the law could not be successfully enforced in those districts in which it was opposed to local habits and convictions. Nullification aimed to dispose of the problem of enforcement in these districts by making the law a dead letter. Modification proposed a change in the law on the theory that the problem of enforcement would be simplified if a larger portion of the public were persuaded to obey it.

In point of years the modification movement was older than the law itself. Even before the Eighteenth Amendment became effective and before the Volstead Act was reported to the House of Representatives, the American Federation of Labor petitioned Congress for the enactment of such legislation as would exempt 2.75 per cent beer from the prohibition of intoxicating beverages.<sup>11</sup> Congress replied to this petition by setting the standard of intoxicating beverages at one half of one

<sup>11</sup>New York Times, June 12, 1919.

per cent, but the American Federation of Labor and a minority of Congress itself continued to quarrel with the logic of this definition.

Over a period of some eight years, in fact, an effort to persuade Congress to reconsider its definition of intoxicating beverages remained the chief objective of such political opposition to prohibition as appeared in the United States. A long series of possible alternatives was proposed, debated and rejected.

In one session of Congress fifty-nine bills were introduced for the purpose of legalizing 2.75 per cent beer.<sup>12</sup> Other plans called for approval of beer of 4 per cent; others for the approval of light wines. In 1926 Senator Edge of New Jersey proposed that the Volstead Act be amended simply by substituting the words "non-intoxicating in fact" for the limitation of one half of one per cent, arguing that this amendment would "copy and assert the very words of the Constitution itself, and its constitutionality therefore cannot be questioned."<sup>13</sup> In 1928 Governor Smith of New York advanced his plan for an amendment of the Volstead Act which would give "a scientific definition of the alcoholic content of an intoxicating beverage" and simultaneously grant authority to each state "to fix its own standard of alcoholic content, subject always to the proviso that that standard could not exceed the maximum fixed by Congress."<sup>14</sup>

What is most significant about the movement in favor of modification is that Governor Smith's proposal

<sup>12</sup>68th Congress, 1st Session.

<sup>13</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 29.*

<sup>14</sup>Address accepting the Democratic nomination, August 22, 1928.

in 1928 was the last proposal made by an opponent of national prohibition which aroused widespread discussion. When another plan for modification caught the attention of the country it was a plan submitted not by an opponent of prohibition but by a friend. This plan was the proposal of Representative Fort of New Jersey for an amendment of the Volstead Act which would legalize liquor brewed in private homes, provided it was non-intoxicating in fact: "To those who want beer and light wines, I suggest that they forego the wish to buy and be content with what they make."<sup>15</sup>

As far as modification was concerned, the field of public interest had been preëmpted by midsummer of 1930 not by a wet but by a dry. This unexpected reversal of rôles was not accidental. It was an unmistakable sign of a waning interest of the wets in the cause of modification. Plans for a possible change in the Volstead Act still appeared occasionally in the party platforms adopted either by Republicans or by Democrats in states where prohibition was not popular. On the whole, however, these plans now seemed to arouse less enthusiasm than at any other time in ten years of prohibition. Presumably there were two chief reasons for this lack of interest.

In the first place, the argument made by Mr. Hughes during the 1928 campaign against the legality of any proposal to modify the Volstead Act had unquestionably carried weight and succeeded in discouraging those more skeptical wets who had always been inclined to doubt the possibility of reconciling beer that was really beer and wine that was really wine with the flat dictum of the Eighteenth Amendment against "intoxicating liquors."

<sup>15</sup>*Congressional Record*, 71st Congress, 2d Session, pp. 2789-2792.

In the second place, the cause of beer and wine had been submerged by a much larger issue. It was no longer a question of tempering discontent by wringing a little comfort from the Volstead Act which occupied the attention of the opponents of prohibition, but the question of restoring what they believed to be the fundamental principle of the federal system of government, by redressing a lost balance of power between the national government and the states.

So completely did this second question now overshadow the first, and so substantially had the field of controversy been broadened under the leadership of such men as Mr. Dwight W. Morrow and such organizations as the various bar associations of the larger cities, that by the end of 1930 only the interjection of some new and important factor seemed capable of reviving interest in the cause of modification.

It was conceivable that such an agency as the President's Commission on Law Enforcement might ultimately arrive at a proposal for modification and certain in these circumstances that controversy over the merits of modification would begin afresh. Without something of this sort to alter the march of events, however, the opposition movement seemed destined to sweep past its earlier objective and to focus its effort not on modification but on repeal.

### §

There was one point with respect to repeal on which both the friends of prohibition and the opponents of prohibition could agree. It was the unquestioned right of every American to work for the repeal of any law of which he disapproved. This method of procedure raised

none of the legal doubts inherent in modification and none of the ethical doubts involved in nullification. It was a plain proposal to take out of the Constitution something which had been put into it. The friends of prohibition acknowledged the legality of this effort but believed it to be quixotic. "There is as much chance of repealing the Eighteenth Amendment," insisted Senator Sheppard in 1930, "as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail."<sup>16</sup>

This confidence in the impregnability of the Eighteenth Amendment rested not only upon the conviction of such men as Senator Sheppard that a majority of the American people favored national prohibition, but also upon a belief that it was practically impossible to repeal any part of the Constitution once it was adopted.

In order to repeal the Eighteenth Amendment it would be necessary first to adopt a resolution by a two thirds vote of both Houses of Congress. Thirty-three Senators out of 531 legislators in both Houses could block repeal at the outset. A veto on repeal rested in 7 per cent of the representation at the capital. Assuming, however, that the proposal for repeal could hurdle Congress, it had then to be ratified by both Houses of every legislature in thirty-six states. Seventy-two legislative bodies must agree before there could be repeal. Thirteen bodies could block repeal forever. These thirteen bodies, rightly apportioned, could exist in states containing approximately 5 per cent of the country's population.

Mathematically, these statistics were a devastating argument against the possibility of repeal. As a matter

<sup>16</sup>Associated Press dispatch, Washington, September 24, 1930.

of everyday politics, they were formidable but not conclusive.

Over a long period of time these figures ignored a steady drift of population and political power to the cities. Over a shorter period they ignored the psychology of mass movement and the possibility, at least conceivable, of such a band-wagon rush on the part of the state legislatures as had occurred in 1918 and 1919, but in the opposite direction. They ignored the political pressure which would presumably be brought to bear on the less populous agrarian states, in the matter of withholding subsidies from the Federal Treasury, if the proponents of repeal succeeded in capturing a majority of Congress. They ignored the question of whether thirteen states with 5 per cent of the country's population, or even twenty states with 15 per cent of its population, would choose as a matter of sound political procedure to subject the American system of government to a heavy strain by exercising their veto power to block the will of a great majority of the American people, if a time came when a great majority was actually recorded in favor of repeal. They ignored, finally, the possibility of any change in attitude on the part of the friends of prohibition: a change perhaps no more likely but quite as credible as a change in attitude on the part of its opponents.

It is significant in this respect that most plans for repeal proposed by the end of 1930 sought to assure the friends of prohibition that repeal need not necessarily mean either the return of the saloon to any part of the United States or the loss of federal assistance to those states which wished to prohibit intoxicating beverages entirely.

The plan for repeal proposed by Governor Smith in 1928, simultaneously with his plan for modification, was

based on the Canadian system of sale by a public agency in those states in which a majority of the electorate approved such a policy by referendum vote.<sup>17</sup> The plan for repeal submitted to the voters of New Jersey by Mr. Morrow in 1930 was a plan for a new amendment which would "restore to the states the power to determine their policy toward the liquor traffic," but simultaneously "vest in the federal government power to give all possible protection and assistance to those states that desire complete prohibition against invasion from states that do not."<sup>18</sup>

Plainly the purpose of such plans was an effort to find some ground on which a new agreement might be reached. "I look forward to a time," said Mr. Morrow in the address in which he announced himself in favor of repeal, "when the old leaders in the temperance movement, the churches and the schools and the social workers, will appreciate that they have not reached a final solution of a world-old problem by the present Eighteenth Amendment. I look forward to the time when the moral teachers of the country will realize that in the battle for a great social reform there was wisdom in the old system of experimenting in forty-eight laboratories rather than in one."<sup>19</sup>

Whether this was a reasonable hope only the future could disclose. There were formidable difficulties in the process of repealing or amending the Eighteenth Amendment. It was an open question whether these difficulties were more formidable or less formidable than the difficulties involved in an effort to persuade the

<sup>17</sup>Address accepting the Democratic nomination, August 22, 1928.

<sup>18</sup>New York *Times*, May 16, 1930.

<sup>19</sup>*Ibid.*

public to accept the law or the effort to persuade the federal government to enforce it, or the effort to solve an unsolved problem by any other means than by a policy of drift.

## §

Whatever possibilities the future held, one fact seemed unmistakable. Until some settlement was reached which disposed of this problem as effectively as the American people could hope to dispose of it, by strict enforcement or by repeal or by some other method, prohibition seemed destined to remain a dominant and disturbing issue. The policy of drift not only failed to enforce the law. It left the raw edge of controversy uppermost.

Friends of the law denounced its enemies as rebels. Opponents of the law insisted that its friends had betrayed the Constitution. Presidents accused the state governments of evading their responsibilities. State governments defied successive Presidents by continuing to vote inadequate appropriations for enforcement. The debate over the results which prohibition had achieved ran on interminably and with mounting bitterness on both sides. The blunt prediction before a committee of the House of Representatives in 1930 that a real effort to enforce the law would lead to open rebellion matched the declaration of an ardent group of prohibitionists that it was now "war to the knife and knife to the hilt between the forces of sobriety and orderly government on one hand and the forces of liquor and lawlessness on the other."<sup>20</sup>

<sup>20</sup>*Hearings of the House Judiciary Committee, 71st Congress, 2d Session, Serial 5, pt. 2, p. 200; resolution of the Southern Baptist Convention, New Orleans, New York Times, May 17, 1930.*

There had been an early hope that the adoption of the Eighteenth Amendment definitely answered the question of regulating the use of intoxicating liquor in so far as this question concerned the United States. No doubt a large number of votes cast in favor of the Amendment, both in Congress and in the state legislatures, had been predicated on this hope. Mr. Harding had expressed the devout wish of many men in public office to be done forever with a contentious issue when he declared, during the debate on the Eighteenth Amendment in the Senate, "I want to see this question settled. I want to take it out of the halls of Congress and refer it to the people, who must make the ultimate decision."<sup>21</sup>

For a brief period of time circumstances favored the theory that the question had actually been settled, that it had at last been taken out of the halls of Congress, that the process of referring it to the state legislatures during the war period was equivalent to referring it "to the people, who must make the ultimate decision." The completeness of the dry victory crushed all political opposition. The effort of Congress to enforce the law primarily by making speeches about it seemed adequate to the occasion. The experiment with national prohibition was so new that the friends of prohibition could afford to dismiss indulgently any lack of enthusiasm on the part of the states.

At the end of a decade nothing remained of these early hopes that the Eighteenth Amendment had finally disposed of the question of intoxicating liquor, either as an issue in politics or as a problem in administration. On the contrary, this question was now more

<sup>21</sup>*Congressional Record*, 65th Congress, 1st Session, p. 5648.  
Cf. Chapter II, *supra*.

of an issue in politics than it had ever been: threatening for the first time actually to split parties whereas it had once merely vexed them; forcing an unwelcome controversy over the Volstead Act into the election of judges, prosecuting attorneys, sheriffs, and even county clerks; dominating political discussion in state and municipal elections, once either party announced a position which permitted the opposing party to raise the issue of modification or repeal; involving municipal administrations in a never-ending search for a workable compromise between enforcement of the law and observance of opinion in communities which did not like it.

"I presume I am like the mayor of every other large city in this country, hoping for a day to come when our efforts may be given to something else than prohibition," Mayor Dever of Chicago told a committee of Congress in 1926. "I want to be relieved, if I can; I have a human longing either to pass the burden of this great subject on to somebody else, or else from the aid of constructive legislation to be relieved of its annoyance. It is an everyday—yes, an hourly—difficulty with us in Chicago. The mayor of that city has great powers. He is responsible for everything that occurs there. The school board, the library board, the great hospitals, the police, fire, everything is brought to the door of the chief executive; and yet, notwithstanding the growing need for attention to these highly important matters, our attention is engrossed with this particular subject. It is almost impossible to give anything approaching good government along general lines, this one subject presses so closely upon our attention. Even I, who have tried to divest myself personally and as chief executive of the subject, and not to allow myself to be embroiled

in it, find myself immersed in it, to the very great damage of the city, from morning until night."<sup>22</sup>

The experience of Mayor Dever had been matched in the experience of mayors of other cities who told their stories to congressional committees, to the public or to the press. It had been matched in the experience of Governors, of state legislatures, of federal administrations, of Congress and of the courts.

To the question of enacting or repealing state enforcement codes, Governors and legislatures devoted a vast amount of party strategy and political maneuvering. To the task of winning compliance with a law which a large part of the public continued to disobey, successive Presidents devoted an endless series of messages and public statements. To the question of controlling a traffic in intoxicating liquor which it had sought to destroy in 1917, once and for all, Congress now gave more time than ever. To the question of enforcing prohibition in the courts the federal judiciary devoted so much of its attention that two thirds of all the criminal prosecutions within its jurisdiction were now cases under a single statute: the National Prohibition Act.

Until this question which troubled city administrations, state administrations and federal administrations had been disposed of by one means or another, by enforcement or by nullification, by observance or by repeal, it was difficult to believe that prohibition could be kept from monopolizing a large part of the attention of the government and determining single-handedly the fitness of many candidates for public office.

<sup>22</sup>*Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session, p. 1378.*

National prohibition by constitutional amendment had begun as the golden dream of thousands of devoted men and women. At the end of a decade it had precipitated a struggle which was to test the political wisdom of the American Republic.

## **APPENDICES**



## APPENDIX A

### ADOPTION OF STATE PROHIBITION LAWS

(SOURCE: *Editorial Research Reports, Washington, August 7, 1928*)

#### (A) STATES ADOPTING LAWS BEFORE APRIL 1, 1917

STATE	PROHIBITION ADOPTED	STATUTORY OR CONSTITUTIONAL	POPULAR VOTE ON PROHIBITION
			For      Against      Majority
Maine.....	1858.....	statutory.....	....      ....      ....
"	1884.....	constitutional...	70,783      23,811      46,972
Kansas.....	1880.....	constitutional...	92,302      84,304      7,998
North Dakota...	1889.....	constitutional...	18,552      17,393      1,159
Georgia.....	1907.....	statutory.....	....      ....      ....
Oklahoma.....	1907.....	constitutional...	130,361      112,258      18,103
Mississippi.....	1908.....	statutory.....	....      ....      ....
North Carolina..	1908.....	statutory.....	113,612      69,416      44,196
Tennessee.....	1909.....	statutory.....	....      ....      ....
West Virginia...	1912.....	constitutional...	164,945      72,603      92,342
Virginia.....	1914.....	statutory.....	94,251      63,886      30,365
Oregon.....	1914.....	constitutional...	136,842      100,362      36,480
Washington....	1914.....	statutory.....	189,840      171,208      18,632
Colorado.....	1914.....	constitutional...	129,589      118,017      11,572
Arizona.....	1914.....	constitutional...	25,887      22,743      3,144
Alabama.....	1915.....	statutory.....	....      ....      ....
Arkansas.....	1915.....	statutory.....	....      ....      ....
Iowa.....	1915.....	statutory.....	....      ....      ....
Idaho.....	1915.....	statutory.....	....      ....      ....
"	1916.....	constitutional...	90,576      35,456      55,120
South Carolina..	1915.....	statutory.....	41,735      16,809      24,926
Montana.....	1916.....	constitutional...	102,776      73,890      28,886
South Dakota...	1916.....	constitutional...	65,334      53,360      11,974
Michigan.....	1916.....	constitutional...	353,378      284,754      68,624
Nebraska.....	1916.....	constitutional...	146,574      117,132      29,442
Indiana.....	1917.....	statutory.....	....      ....      ....
Utah.....	1917.....	statutory.....	....      ....      ....
New Hampshire.	1917.....	statutory.....	....      ....      ....
			<hr/>
			1,967,337      1,437,402      529,935

## (B) STATES ADOPTING LAWS AFTER APRIL 1, 1917

STATE	PROHIBITION ADOPTED	STATUTORY OR CONSTITUTIONAL	POPULAR VOTE ON PROHIBITION
			For      Against      Majority
New Mexico.....	1917.....	constitutional...	28,732      12,147      16,585
Utah.....	1918.....	constitutional...	42,691      15,780      26,911
Texas.....	1918.....	statutory.....	.....      .....      .....
"	1919.....	constitutional...	159,723      140,099      19,624
Ohio.....	1918.....	constitutional...	463,654      437,895      25,759
Wyoming.....	1918.....	constitutional...	31,439      10,200      21,239
Florida.....	1918.....	constitutional...	21,851      13,609      8,242
Nevada.....	1918.....	statutory.....	13,248      9,060      4,188
Kentucky.....	1919.....	constitutional...	208,905      198,671      10,234
			<hr/>
			970,243      837,461      132,782
Total popular vote, (A) and (B).....		2,937,580	2,274,863      662,717

## APPENDIX B

### SENATE VOTE ON THE EIGHTEENTH AMENDMENT

(SOURCE: *Congressional Record, 65th Congress, 1st Session*, p. 5666)

#### FOR THE AMENDMENT—65

##### Republicans—29

Borah, Idaho.	Johnson, Cal.	Norris, Neb.
Brady, Idaho.	Jones, Wash.	Page, Vt.
Colt, R. I.	Kellogg, Minn.	Poindexter, Wash.
Cummins, Ia.	Kenyon, Ia.	Sherman, Ill.
Curtis, Kans.	Knox, Pa.	Smith, Mich.
Fernald, Me.	LaFollette, Wisc.	Smoot, Utah.
Frelinghuysen, N. J.	McCumber, S. D.	Sterling, S. D.
Gronna, N. D.	McNary, Ore.	Sutherland, W. Va.
Hale, Me.	New, Ind.	Watson, Ind.
Harding, Ohio.	Nelson, Minn.	

##### Democrats—36

Ashurst, Ariz.	Martin, Va.	Simmons, N. C.
Bankhead, Ala.	Myers, Mont.	Smith, Ariz.
Beckham, Ky.	Newlands, Nev.	Smith, Ga.
Chamberlain, Ore.	Overman, N. C.	Smith, S. C.
Fletcher, Fla.	Owen, Okla.	Stone, Mo.
Gore, Okla.	Pittman, Nev.	Swanson, Va.
Hollis, N. H.	Randsell, La.	Thompson, Kans.
Jones, N. M.	Robinson, Ark.	Trammel, Fla.
Kendrick, Wyo.	Saulsbury, Del.	Vardaman, Miss.
King, Utah.	Shafroth, Col.	Walsh, Mont.
Kirby, Ark.	Sheppard, Tex.	Williams, Miss.
McKellar, Tenn.	Shields, Tenn.	Wolcott, Del.

## AGAINST THE AMENDMENT—20

## Republicans—8

Brandegee, Conn.	Lodge, Mass.	Warren, Wyo.
Calder, N. Y.	Penrose, Pa.	Weeks, Mass.
France, Md.	Wadsworth, N. Y.	

## Democrats—12

Broussard, La.	Hitchcock, Neb.	Phelan, Cal.
Culberson, Tex.	Husting, Wisc.	Pomerene, Ohio.
Gerry, R. I.	James, Ky.	Reed, Mo.
Hardwick, Ga.	Lewis, Ill.	Underwood, Ala.

## PAIRS OF ABSENTEES

Goff (W. Va.) and Townsend (Mich.), Republicans, for, with Tillman (S. C.) Democrat, against.  
 Gallinger (N. H.), Republican, and Johnson (S. D.), Democrat, for, with Hughes (N. J.), Democrat, against.  
 Fall (N. M.), Republican, and Thomas (Col.), Democrat, for, with McLean (Conn.), Republican, against.

## APPENDIX C

### HOUSE VOTE ON THE EIGHTEENTH AMENDMENT

(SOURCE: *Congressional Record, 65th Congress, 2d Session, p. 469*)

#### FOR THE AMENDMENT—282

#### Republicans—137

Anderson, Minn.	Dunn, N. Y.	Hersey, Me.
Anthony, Kans.	Elliott, Ind.	Hicks, N. Y.
Austin, Tenn.	Ellsworth, Minn.	Hollingsworth, O.
Bland, Ind.	Elston, Cal.	Hutchinson, N. J.
Bowers, W. Va.	Emerson, Ohio.	Ireland, Ill.
Browne, Wisc.	Esch, Wisc.	James, Mich.
Browning, N. J.	Fairfield, Ind.	Johnson, S. D.
Burroughs, N. H.	Farr, Pa.	Johnson, Wash.
Butler, Pa.	Fess, Ohio.	Kearns, O.
Campbell, Kans.	Focht, Pa.	Kelley, Mich.
Cannon, Ill.	Fordney, Mich.	Kennedy, Ia.
Carter, Mass.	Foss, Ill.	Kiess, Pa.
Cooper, Ohio.	Frear, Wisc.	King, Ill.
Cooper, W. Va.	French, Ida.	Kinkaid, Neb.
Cooper, Wisc.	Fuller, Ill.	Knutson, Minn.
Copley, Ill.	Good, Ia.	Kraus, Ind.
Costello, Pa.	Goodall, Me.	Kreider, Pa.
Cramton, Mich.	Gould, N. Y.	LaFollette, Wash.
Currie, Mich.	Graham, Ill.	Langley, Ky.
Dale, Vt.	Green, Ia.	Lenroot, Wisc.
Dallinger, Mass.	Griest, Pa.	Little, Kans.
Darrow, Pa.	Hadley, Wash.	Lundeen, Minn.
Dempsey, N. Y.	Hamilton, Mich.	McCormick, Ill.
Denison, Ill.	Hamilton, N. Y.	McCulloch, O.
Dillon, S. D.	Haugen, Ia.	McFadden, Pa.
Dowell, Ia.	Hawley, Ore.	McKensie, Ill.

## Appendices

Republicans—*Continued.*

McKinley, Ill.	Reavis, Neb.	Strong, Pa.
McLaughlin, Mich.	Reed, W. Va.	Sweet, Ia.
Mapes, Mich.	Robbins, Pa.	Switzer, O.
Miller, Minn.	Rose, Pa.	Temple, Pa.
Mondell, Wyo.	Rowe, N. Y.	Timberlake, Col.
Moores, Ind.	Rowland, Pa.	Towner, Ia.
Morgan, Okla.	Sanders, Ind.	Treadway, Mass.
Mott, N. Y.	Sanders, N. Y.	Vestal, Ind.
Nelson, Wisc.	Scott, Ia.	Volstead, Minn.
Norton, N. D.	Scott, Mich.	Wason, N. H.
Osborne, Cal.	Sells, Tenn.	Wheeler, Ill.
Paige, Mass.	Sinnott, Ore.	White, Me.
Parker, N. Y.	Slemp, Va.	Williams, Ill.
Peters, Me.	Sloan, Neb.	Wilson, Ill.
Platt, N. Y.	Smith, Ida.	Wood, Ind.
Powers, Ky.	Smith, Mich.	Woods, Ia.
Pratt, N. Y.	Snell, N. Y.	Woodyard, W. Va.
Purnell, Ind.	Steenerson, Minn.	Young, N. D.
Ramseyer, Ia.	Sterling, Ill.	Zihlman, Md.
Rankin, Mont.	Stiness, R. I.	

## Democrats—141

Adamson, Ga.	Caraway, Ark.	Flood, Va.
Alexander, Mo.	Carlin, Va.	Foster, Ill.
Almon, Ala.	Carter, Okla.	Gandy, S. D.
Ashbrook, Ohio.	Clark, Fla.	Garrett, Tenn.
Aswell, La.	Claypool, O.	Garrett, Tex.
Ayers, Kans.	Collier, Miss.	Glass, Va.
Bankhead, Ala.	Connally, Tex.	Godwin, N. C.
Barkley, Ky.	Connelly, Kans.	Gregg, Tex.
Barnhart, Ind.	Cox, Ind.	Hamlin, Mo.
Beakes, Mich.	Crisp, Ga.	Harrison, Miss.
Bell, Ga.	Decker, Mo.	Harrison, Va.
Beshlin, Pa.	Denton, Ind.	Hastings, Okla.
Black, Tex.	Dickinson, Mo.	Hayden, Ariz.
Booher, Mo.	Dill, Wash.	Helm, Ky.
Borland, Mo.	Dixon, Ind.	Helvering, Kans.
Brand, Ga.	Doolittle, Kans.	Hensley, Mo.
Brodbeck, Pa.	Doughton, N. C.	Hilliard, Col.
Brumbaugh, O.	Drane, Fla.	Holland, Va.
Burnett, Ala.	Evans, Mont.	Hood, N. C.
Byrnes, S. C.	Ferris, Okla.	Houston, Tenn.
Byrns, Tenn.	Fields, Ky.	Howard, Ga.
Candler, Miss.	Fisher, Tenn.	Hull, Tenn.

Democrats—*Continued.*

Humphreys, Miss.	Olney, Mass.	Steagall, Ala.
Jacoway, Ark.	Overstreet, Ga.	Stedman, N. C.
Johnson, Ky.	Padgett, Tenn.	Stephens, Miss.
Jones, Tex.	Park, Ga.	Sterling, Pa.
Jones, Va.	Polk, Del.	Stevenson, S. C.
Keating, Col.	Price, Md.	Sumners, Tex.
Kehoe, Fla.	Quin, Miss.	Taylor, Ark.
Kelly, Pa.	Ragsdale, S. C.	Thomas, Ky.
Kettner, Cal.	Rainey, Ill.	Thompson, Okla.
Kincheloe, Ky.	Raker, Cal.	Tillman, Ark.
Kitchin, N. C.	Rayburn, Tex.	Venable, Miss.
Larsen, Ga.	Robinson, N. C.	Vinson, Ga.
Lee, Ga.	Romjue, Mo.	Walker, Ga.
Lever, S. C.	Rubey, Mo.	Walton, N. M.
Littlepage, W. Va.	Rucker, Mo.	Watkins, La.
Lobeck, Neb.	Russell, Mo.	Watson, Va.
Lunn, N. Y.	Sanders, La.	Weaver, N. C.
McClintic, O.	Saunders, Va.	Webb, N. C.
McKeown, Okla.	Sears, Fla.	Welling, Utah.
Mays, Utah.	Shackleford, Mo.	Whaley, S. C.
Montague, Va.	Shallenberger, Neb.	White, Ohio.
Moon, Tenn.	Shouse, Kans.	Wilson, La.
Nicholls, S. C.	Sims, Tenn.	Wingo, Ark.
Oldfield, Ark.	Sisson, Miss.	Wise, Ga.
Oliver, Ala.	Snook, O.	Young, Tex.

## Independents—4

Baer, N. D. (Non-Partisan)   Fuller, Mass. (Independent)   Randall, Cal. (Prohibitionist)   Schall, Minn. (Progressive).

## AGAINST THE AMENDMENT—128

## Republicans—62

Bacharach, N. J.	Edmonds, Pa.	Haskell, N. Y.
Britten, Ill.	Fairchild, B., N. Y.	Heaton, Pa.
Cary, Wisc.	Francis, N. Y.	Hull, Ia.
Chandler, N. Y.	Freeman, Conn.	Juul, Ill.
Clark, Pa.	Garland, Pa.	Kahn, Cal.
Classon, Wisc.	Gillett, Mass.	Kennedy, R. I.
Crago, Pa.	Glynn, Conn.	Lehlbach, N. J.
Davidson, Wisc.	Graham, Pa.	Longworth, O.
Davis, Minn.	Gray, N. J.	Lufkin, Mass.
Drukker, N. J.	Greene, Mass.	McArthur, Ore.
Dyer, Mo.	Greene, Vt.	McLaughlin, Pa.

## Appendices

### Republicans—*Continued.*

Madden, Ill.	Porter, Pa.	Templeton, Pa.
Magee, N. Y.	Ramsey, N. J.	Tilson, Conn.
Meeker, Mo.	Roberts, Nev.	Vare, Pa.
Merritt, Conn.	Rodenburg, Ill.	Voight, Wisc.
Moore, Pa.	Sanford, N. Y.	Waldow, N. Y.
Morin, Pa.	Scott, Pa.	Walsh, Mass.
Mudd, Md.	Siegel, N. Y.	Ward, N. Y.
Nichols, Mich.	Snyder, N. Y.	Watson, Pa.
Nolan, Cal.	Stafford, Wisc.	Winslow, Mass.
Parker, N. J.	Swift, N. Y.	

### Democrats—64

Blackmon, Ala.	Gallagher, N. Y.	Oliver, N. Y.
Bruckner, N. Y.	Gard, Ohio.	O'Shaunessy, R. I.
Buchanan, Tex.	Garner, Tex.	Overmyer, Ohio.
Caldwell, N. Y.	Gordon, Ohio.	Phelan, Mass.
Campbell, Pa.	Gray, Ala.	Pou, N. C.
Cantrill, Ky.	Griffin, N. Y.	Riordan, N. Y.
Carew, N. Y.	Hamill, N. J.	Rouse, Ky.
Church, Cal.	Hardy, Tex.	Sabath, Ill.
Coady, Md.	Heflin, Ala.	Sherley, Ky.
Crosser, O.	Huddleston, Ala.	Sherwood, O.
Dale, N. Y.	Hulbert, N. Y.	Slayden, Tex.
Dent, Ala.	Igoe, Mo.	Small, N. C.
Dewalt, Pa.	Key, Ohio.	Smith, C., N. Y.
Dies, Tex.	Lazaro, La.	Smith, T., N. Y.
Dominick, S. C.	Lea, Cal.	Steele, Pa.
Dooling, N. Y.	Lesher, Pa.	Sullivan, N. Y.
Doremus, Mich.	Linthicum, Md.	Talbott, Md.
Dupré, La.	Lonergan, Conn.	Van Dyke, Minn.
Eagan, N. J.	McAndrews, Ill.	Welty, Ohio.
Estopinal, La.	McLemore, Tex.	Wilson, Tex.
Fitzgerald, N. Y.	Maher, N. Y.	
Flynn, N. Y.	Mansfield, Tex.	

### Independents—2

London, N. Y. (Socialist)      Martin, La. (Progressive)

### PAIRS OF ABSENTEES

- Stephens, (Neb.), and Neeley, (W. Va.), for the Amendment, with  
Gallivan, Mass., against.
- Goodwin, (Ark.), and Miller, (Wash.), for the Amendment, with  
Tague, Mass., against.
- Taylor, (Col.), and G. W. Fairchild, (N. Y.), for the Amendment,  
with Curry, Cal., against.

## APPENDIX D

### RATIFICATION OF THE EIGHTEENTH AMENDMENT BY THE STATES

(SOURCE: *Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 1*)

STATE	SENATE		HOUSE	
	Date	Vote	Date	Vote
1. Mississippi.....	Jan. 8, 1918	29 to 5	Jan. 8, 1918	93 to 3
2. Virginia.....	Jan. 10, 1918	30 to 8	Jan. 11, 1918	84 to 13
3. Kentucky.....	Jan. 14, 1918	27 to 5	Jan. 14, 1918	67 to 11
4. South Carolina.....	Jan. 18, 1918	34 to 6	Jan. 23, 1918	66 to 28
5. North Dakota.....	Jan. 25, 1918	43 to 2	Jan. 24, 1918	96 to 10
6. Maryland.....	Feb. 13, 1918	18 to 7	Feb. 8, 1918	58 to 36
7. Montana.....	Feb. 16, 1918	34 to 2	Feb. 18, 1918	79 to 7
8. Texas.....	Feb. 28, 1918	15 to 7	Mar. 1, 1918	73 to 36
9. Delaware.....	Mar. 18, 1918	13 to 3	Mar. 14, 1918	27 to 6
10. South Dakota <sup>1</sup> .....	Mar. 19, 1918	43 to 0	Mar. 20, 1918	86 to 0
11. Massachusetts.....	Apr. 2, 1918	27 to 12	Mar. 26, 1918	145 to 91
12. Arizona.....	May 23, 1918	18 to 0	May 24, 1918	29 to 3
13. Georgia.....	June 26, 1918	35 to 2	June 26, 1918	129 to 24
14. Louisiana.....	Aug. 6, 1918	21 to 20	Aug. 8, 1918	69 to 41
15. Florida.....	Nov. 27, 1918	25 to 2	Nov. 27, 1918	61 to 3
16. Michigan <sup>2</sup> .....	Jan. 2, 1919	30 to 0	Jan. 2, 1919	88 to 3
17. Ohio.....	Jan. 7, 1919	20 to 12	Jan. 7, 1919	85 to 29
18. Oklahoma.....	Jan. 7, 1919	43 to 0	Jan. 7, 1919	90 to 8
19. Maine.....	Jan. 8, 1919	29 to 0	Jan. 8, 1919	120 to 22
20. Idaho <sup>4</sup> .....	Jan. 8, 1919	38 to 0	Jan. 7, 1919	62 to 0
21. West Virginia.....	Jan. 8, 1919	26 to 0	Jan. 9, 1919	81 to 3
22. Washington <sup>1</sup> .....	Jan. 13, 1919	42 to 0	Jan. 13, 1919	93 to 0
23. Tennessee.....	Jan. 8, 1919	28 to 2	Jan. 13, 1919	82 to 2

<sup>1</sup>Unanimous in both Houses.

<sup>2</sup>Repassed in House to correct error, January, 1923.

APPENDIX D—*Continued.*

STATE	SENATE		HOUSE	
	Date	Vote	Date	Vote
24. California.....	Jan. 10, 1919	25 to 14	Jan. 13, 1919	48 to 28
25. Indiana.....	Jan. 13, 1919	41 to 6	Jan. 14, 1919	87 to 11
26. Illinois.....	Jan. 8, 1919	30 to 15	Jan. 14, 1919	84 to 66
27. Arkansas.....	Jan. 14, 1919	30 to 0	Jan. 13, 1919	94 to 2
28. North Carolina.....	Jan. 10, 1919	49 to 0	Jan. 14, 1919	94 to 10
29. Alabama.....	Jan. 14, 1919	23 to 11	Jan. 14, 1919	64 to 34
30. Kansas <sup>1</sup> .....	Jan. 14, 1919	39 to 0	Jan. 14, 1919	121 to 0
31. Oregon.....	Jan. 15, 1919	30 to 0	Jan. 14, 1919	53 to 3
32. Iowa.....	Jan. 15, 1919	42 to 7	Jan. 15, 1919	86 to 13
33. Utah <sup>1</sup> .....	Jan. 15, 1919	16 to 0	Jan. 14, 1919	43 to 0
34. Colorado.....	Jan. 15, 1919	34 to 1	Jan. 15, 1919	60 to 2
35. New Hampshire.....	Jan. 15, 1919	19 to 4	Jan. 15, 1919	222 to 131
36. Nebraska.....	Jan. 14, 1919	31 to 1	Jan. 16, 1919	98 to 0
37. Missouri.....	Jan. 16, 1919	22 to 10	Jan. 16, 1919	104 to 36
38. Wyoming <sup>1</sup> .....	Jan. 16, 1919	25 to 0	Jan. 16, 1919	53 to 0
39. Wisconsin.....	Jan. 16, 1919	19 to 11	Jan. 17, 1919	58 to 39
40. Minnesota.....	Jan. 16, 1919	48 to 11	Jan. 17, 1919	92 to 36
41. New Mexico.....	Jan. 20, 1919	12 to 4	Jan. 16, 1919	45 to 1
42. Nevada.....	Jan. 21, 1919	14 to 1	Jan. 20, 1919	34 to 3
43. Vermont.....	Jan. 16, 1919	24 to 4	Jan. 29, 1919	155 to 58
44. New York.....	Jan. 29, 1919	27 to 24	Jan. 23, 1919	81 to 66
45. Pennsylvania.....	Feb. 25, 1919	29 to 16	Feb. 4, 1919	110 to 93
46. New Jersey.....	Mar. 7, 1922	12 to 2	Mar. 9, 1922	33 to 24

<sup>1</sup>Unanimous in both Houses.

Total Senate vote, 1,310 for, to 237 against.

Total House vote, 3,782 for, to 1,035 against.

## APPENDIX E

### THE NATIONAL PROHIBITION ACT

The National Prohibition Act, popularly known as the Volstead Act, consists of three Titles: Title I. To provide for the enforcement of War Prohibition. Title II. Prohibition of Intoxicating Beverages; and Title III. Industrial Alcohol.

Of these three Titles, the first is no longer effective and the third is concerned with technical provisions for users of industrial alcohol. Title II contains the general provisions for the enforcement of constitutional prohibition. The text of this title follows.

#### TITLE II.

##### PROHIBITION OF INTOXICATING BEVERAGES.

SEC. 1. When used in Title II. and Title III. of this act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in Section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the Commissioner may by regulation prescribe.

(2) The word "person" shall mean and include natural persons, associations, co-partnerships, and corporations.

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the Commissioner may grant the request.

(5) The term "permit" shall mean a formal written authorization by the Commissioner setting forth specifically therein the things that are authorized.

(6) The term "bond" shall mean an obligation authorized or required by or under this act or any regulation, executed in such form and for such a penal sum as may be required by a court, the Commissioner, or prescribed by regulation.

(7) The term "regulation" shall mean any regulation prescribed by the Commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this act, and the Commissioner is authorized to make such regulations.

Any act authorized to be done by the Commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the Commissioner may be filed with an Assistant Commissioner or other person designated by the Commissioner to receive such records.

SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney-General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States Commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States Attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a Grand Jury. Section 1014, of the Revised Statutes of the United States, is hereby made applicable in the enforcement of this act. Officers mentioned in said Section 1014 are authorized to issue search warrants under the limitations provided in Title XI. of the act approved June 15, 1917 (Fortieth Statutes at Large, Page 217, et seq.).

SEC. 3. No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as herein provided, and the Commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

SEC. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and syrups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may

purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this act and as directed by the Commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, syrup, or the articles named in paragraphs b, c, and d of this section, which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in Paragraphs a, b, c, and d of this section for beverage purposes, or any extract or syrup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, syrup, or other article is used as an ingredient, shall be subject to the penalties provided in Section 29 of this Title. If the Commissioner shall find after notice and hearing as provided for in Section 5 of this Title, that any person has sold any flavoring extract, syrup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, syrup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the Commissioner may deem necessary to prevent such illegal sales, and in addition the Commissioner shall require a record and report of sales.

SEC. 5. Whenever the Commissioner has reason to believe that any article mentioned in Section 4 does not correspond with the descriptions and limitations therein provided he shall cause an analysis of said article to be made, and if, upon such analysis, the Commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the Commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

If the manufacturer of said article fails to show to the satisfaction of the Commissioner that the article corresponds to the descriptions and limitations provided in Section 4 of this Title, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the Commissioner reviewed, and the court may affirm, modify, or reverse the finding of the Commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article.

SEC. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the Commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the Commissioner shall prescribe, purchase, and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

## Appendices

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the Commissioner may without formal application or new bond extend any permit granted under this act or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further*, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to any one to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the Commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The Commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the Commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this title. In the event of the refusal by the Commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in Section 5 hereof.

Nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes, or like religious rites, except Section 6 (save as the same requires a permit to purchase) and Section 10 hereof, and the provisions of this act prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the Commissioner, be granted a permit to supervise such manufacture.

SEC. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not

more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filing a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the Commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

SEC. 8. The Commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost, to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from one to one hundred, and each book shall be given a number, and the stubs in each book shall carry the same numbers as and be copies of the prescriptions. The books containing such stubs shall be returned to the Commissioner when the prescription blanks have been used, or sooner if directed by the Commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases.

SEC. 9. If at any time there shall be filed with the Commissioner a complaint under oath setting forth facts showing, or if the Commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this act, or has violated the laws of any State relating to intoxicating liquor, the Commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint, or in the event that the proceedings be initiated by the Commissioner, with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearings shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of wilfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the Commissioner, the permittee may have a review of his decision before a court of equity in the manner provided in Section 5 hereof. During the pendency of such action such permit shall be temporarily revoked.

SEC. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The Commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this act provided.

SEC. 11. All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale, and only to persons having permits to purchase in such quantities.

SEC. 12. All persons manufacturing liquor for sale under the provisions of this title shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon; and all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufactured, the date of sale, and the person to whom sold; which label shall likewise be kept and maintained thereon until the liquor is used for the purpose for which such sale was authorized.

SEC. 13. It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase, which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record.

SEC. 14. It shall be unlawful for a person to use or induce any carrier, or any agent or employé thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit.

SEC. 15. It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false.

SEC. 16. It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to, a person when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquor.

SEC. 17. It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale, or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications, or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: *Provided, however,* That nothing in this act or in the act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part I, Page 1058, et seq.), shall apply to newspapers published in foreign countries when mailed to this country.

SEC. 18. It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed or intended for use in the unlawful manufacture of intoxicating liquor.

SEC. 19. No person shall solicit or receive, nor knowingly permit his employé to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this act.

SEC. 20. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property. Such action may be brought in any court of competent jurisdiction. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

SEC. 21. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000, or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction.

SEC. 22. An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the Commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but, on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or

place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than \$500 nor more than \$1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

SEC. 23. That any person who shall, with intent to effect a sale of liquor, by himself, his employe, servant, or agent, for himself or any person, company, or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

For removing and selling property in enforcing this act the officer shall be entitled to charge and receive the same fee as the Sheriff of the County would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court.

Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

SEC. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than \$500 nor more than \$1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI. of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor shall be destroyed unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized

on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

SEC. 26. When the Commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction: but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water, or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds, after deducting the expenses and costs, shall be paid into the Treasury of the United States as miscellaneous receipts.

SEC. 27. In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this act the court shall have jurisdiction upon the application of the United States Attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts, and all liquor heretofore seized in any suit or proceeding brought for violation of law may likewise be so disposed of, if not claimed within sixty days from the date this section takes effect.

SEC. 28. The Commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

SEC. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than \$200

nor more than \$2,000, and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than \$500; for a second offense not less than \$100 nor more than \$1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than \$500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted, and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

SEC. 30. No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpoena of any court in any suit or proceeding based upon or growing out of any alleged violation of this act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpoena and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 31. In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent or employé, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district.

SEC. 32. In any affidavit, information, or indictment for the violation of this act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

SEC. 33. After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provision of this title. Every person legally permitted under this title to have liquor shall report to the Commissioner within ten days after the date when the Eighteenth Amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

SEC. 34. All records and reports kept or filed under the provisions of this act shall

be subject to inspection at any reasonable hour by the Commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such reports shall be furnished to the Commissioner when called for.

SEC. 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of \$500 on retail dealers and \$1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The Commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

SEC. 36. If any provision of this act shall be held invalid it shall not be construed to invalidate other provisions of the act.

SEC. 37. Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor.

A manufacturer of any beverage containing less than one-half of 1 per centum of alcohol by volume may, on making application and giving such bond as the Commissioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter, or wine, containing more than one-half of 1 per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the Commissioner may prescribe be reduced below such one-half of 1 per centum of alcohol: *Provided*, That such liquid may be removed and transported, under bond and under such regulations as the Commissioner may prescribe, from one bonded plant or warehouse to another for the purpose of having the alcohol extracted therefrom. And such liquids may be developed, under permit, by persons other than the manufacturers of beverages containing less than one-half of 1 per centum of alcohol by volume, and sold to such manufacturers for conversion into such beverages. The alcohol removed from such liquid, if evaporated and not condensed and saved, shall not be subject to tax; if saved, it shall be subject to the same law as other alcoholic liquors.

Credit shall be allowed on the tax due on any alcohol so saved to the amount of any tax paid upon distilled spirits or brandy used in the fortification of the liquor from which the same is saved.

When fortified wines are made and used for the production of nonbeverage alcohol and dealcoholized wines containing less than one-half of 1 per centum of alcohol by volume, no tax shall be assessed or paid on the spirits used in such fortification.

fication, and such dealcoholized wines produced under the provisions of this act, whether carbonated or not, shall not be subject to the tax on artificially carbonated or sparkling wines, but shall be subject to the tax on still wines only.

In any case where the manufacturer is charged with manufacturing or selling for beverage purposes any malt, vinous, or fermented liquids containing one-half of 1 per centum or more of alcohol by volume, or in any case where the manufacturer, having been permitted by the Commissioner to develop a liquid such as ale, beer, porter, or wine containing more than one-half of 1 per centum of alcohol by volume in the manner and for the purpose herein provided, is charged with failure to reduce the alcoholic content of any such liquid below such one half of 1 per centum before withdrawing the same from the factory, then in either such case the burden of proof shall be on such manufacturer to show that such liquid so manufactured, sold, or withdrawn contains less than one-half of 1 per centum of alcohol by volume. In any suit or proceeding involving the alcoholic content of any beverage, the reasonable expense of analysis of such beverage shall be taxed as costs in the case.

SEC. 38. The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectively authorized to appoint and employ such assistants, experts, clerks, and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the enforcement of the provisions of this act, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the Commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this act, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by the Civil Service Act: *Provided*, That the Commissioner and Attorney General in making such appointments shall give preference to those who have served in the military or naval service in the recent war, if otherwise qualified, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be required for the enforcement of this act, including personal services in the District of Columbia, and for the fiscal year ending June 30, 1920, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$2,000,000 for the use of the Commissioner of Internal Revenue and \$100,000 for the use of the Department of Justice for the enforcement of the provisions of this act, including personal services in the District of Columbia, and necessary printing and binding.

SEC. 39. In all cases wherein the property of any citizen is proceeded against or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court.

## APPENDIX F

### AMOUNTS APPROPRIATED BY CONGRESS FOR THE USE OF THE PROHIBITION BUREAU FOR ENFORCE- MENT OF THE NATIONAL PROHIBITION ACT, FOR THE FISCAL YEARS 1920 TO 1929 INCLUSIVE

(SOURCE: *Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 2*)

1920 (January 17 to June 30).....	\$ 2,000,000
Deficiency appropriations.....	200,000
Total for 1920.....	2,200,000
1921.....	4,750,000
Deficiency appropriation (March 1, 1921).....	1,400,000
Deficiency appropriation (June 16, 1921).....	200,000
Total for 1921.....	6,350,000
1922.....	6,750,000
1923.....	8,500,000
1924.....	8,250,000
1925.....	10,012,330
1926.....	9,670,560
1927.....	9,306,245
Supplemental appropriation, 1927 (July 3, 1926)....	2,686,760
Total for 1927.....	11,993,005
1928.....	11,990,965
1929.....	11,378,700
Welsh Act deficiency appropriation (March 4, 1929)	589,010
Amount authorized by the Commissioner of Prohibi- tion to be expended from deficiency appropriation	433,910
Total for 1929.....	12,401,620

(The above figures are exclusive of amounts appropriated for enforcement of the Harrison Narcotic Act.)

## APPENDIX G

### ARRESTS, SEIZURES, ETC., MADE BY FEDERAL PROHIBITION AGENTS SINCE THE EFFECTIVE DATE OF THE NATIONAL PROHIBITION ACT

*(SOURCE: Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 64)*

	PERIOD FROM JAN. 17 TO JUNE 30, 1920	FISCAL YEAR ENDED JUNE 30	
		1921	1922
Illicit distilleries seized.....	4,645	9,746	8,313
Illicit stills seized.....	4,888	10,991	10,994
Illicit still worms seized.....	2,218	5,182	10,203
Illicit fermenters seized.....	21,111	70,014	81,640
Gallons of distilled spirits seized	137,772.38	413,987.32	382,390.44
Gallons of malt liquor seized..	1,637,483.00	4,963,005.27	4,187,625.67
Gallons of wine, cider, mash, and pomace seized.....	95,672.90	428,303.88	4,052,213.88
Number of automobiles seized..	209	706	1,886
Number of boats and launches seized.....	3	23	74
Total appraised value of pro- perty seized.....	\$1,262,196.67	\$8,181,866.70	\$5,872,092.09
Number of agents injured.....	0	13	28
Number of agents killed.....	0	14	9
Number of persons arrested....	10,548	34,175	42,223

	FISCAL YEAR ENDED JUNE 30		
	1923	1924	1925
Illicit distilleries seized.....	12,219	10,392	12,023
Illicit stills seized.....	14,000	15,853	17,854
Illicit still worms seized.....	7,512	8,211	7,850
Illicit fermenters seized.....	124,401	124,720	134,810
Gallons of distilled spirits seized	457,365.25	1,672,743.81	1,102,787.65
Gallons of malt liquor seized..	4,803,872.92	5,379,528.03	7,040,537.30
Gallons of wine, cider, mash, and pomace seized.....	9,085,411.34	8,774,916.80	10,572,933.50
Number of automobiles seized..	3,977	5,214	6,089
Number of boats and launches seized.....	134	236	182
Total appraised value of pro- perty seized.....	\$11,478,277.53	\$10,843,881.83	\$11,199,664.46
Number of agents injured.....	45	28	39
Number of agents killed.....	11	2	7
Number of persons arrested....	66,936	68,116	62,747

## APPENDIX G—Continued

### ARRESTS, SEIZURES, ETC., MADE BY FEDERAL PROHIBITION AGENTS SINCE THE EFFECTIVE DATE OF THE NATIONAL PROHIBITION ACT

*(SOURCE: Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 64)*

	FISCAL YEAR ENDED JUNE 30	
	1926	1927
Illicit distilleries seized.....	12,227	14,512
Illicit stills seized.....	12,248	11,881
Illicit still worms seized.....	6,974	8,024
Illicit fermenters seized.....	130,530	173,656
Gallons of distilled spirits seized.....	1,247,520.08	1,462,532.76
Gallons of malt liquor seized.....	14,220,551.93	5,971,903.35
Gallons of wine, cider, mash, and pomace seized..	13,273,738.10	21,736,395.24
Number of automobiles seized.....	5,935	7,137
Number of boats and launches seized.....	187	353
Total appraised value of property seized.....	\$13,835,524.85	\$24,540,338.03
Number of agents injured.....	50	59
Number of agents killed.....	6	6
Number of persons arrested.....	58,391	64,986

	FISCAL YEAR ENDED JUNE 30	
	1928	1929
Illicit distilleries seized.....	16,220	15,794
Illicit stills seized.....	18,980	11,542
Illicit still worms seized.....	9,133	7,982
Illicit fermenters seized.....	217,278	211,924
Gallons of distilled spirits seized.....	1,048,636.84	1,185,654.88
Gallons of malt liquor seized.....	4,254,029.58	3,312,491.28
Gallons of wine, cider, mash, and pomace seized..	27,171,567.06	26,393,410.74
Number of automobiles seized.....	6,934	7,299
Number of boats and launches seized.....	81	89
Total appraised value of property seized.....	\$23,204,345.20	\$25,726,357.14
Number of agents injured.....	89	94
Number of agents killed.....	10	6
Number of persons arrested.....	75,307	66,878

## APPENDIX H

### CRIMINAL PROSECUTIONS UNDER THE NATIONAL PROHIBITION ACT IN THE FEDERAL COURTS, AS SHOWN BY THE REPORTS OF THE DEPARTMENT OF JUSTICE, BY CASES

(SOURCE: *Statistics Concerning Intoxicating Liquors, United States Treasury Department, 1930, p. 70*)

	(JANUARY-JUNE), 1920	1921	1922	1923
Commenced during the year.....	7,291	29,114	34,984	49,021
Terminated during the same period.....	5,095	21,297	28,743	42,730
Convictions.....	4,315	17,962	22,749	34,067
Acquittals.....	125	765	1,195	1,770
Nol pros or dismissed.....	655	2,570	4,799	6,893
Pleas of guilty.....	4,109	16,610	20,571	30,654
Trials by jury.....	322	2,075	3,346	4,835
Pending close of year.....	2,196	10,365	16,713	23,060
Fines and penalties imposed.....	\$605,314.42	\$3,360,298.46	\$4,041,456.03	\$5,832,389.18
Realized on fines, forfeitures, etc. ....	\$507,482.70	\$2,418,117.55	\$2,376,305.20	\$4,366,056.00
Collected without prosecution.....	( <sup>1</sup> )	( <sup>1</sup> )	\$846.95	\$144,528.63
		1924	1925	1926
Commenced during the year....	45,878	50,743	44,492	
Terminated during the same period.....	46,609	47,925	48,529	
Convictions.....	37,181	38,498	37,018	
Acquittals.....	1,754	1,805	1,303	
Nol pros or dismissed.....	7,674	7,622	7,580	
Pleas of guilty.....	33,834	35,034	34,233	
Trials by jury.....	5,217	5,389	4,090	
Pending close of year.....	22,329	24,684	20,749	
Fines and penalties imposed....	\$7,497,235.19	\$7,681,947.28	\$7,494,557.09	
Realized on fines, forfeitures, etc. ....	\$5,682,719.87	\$5,312,338.38	\$5,231,130.90	
Collected without prosecution... ..	\$84,052.65	\$65,430.10	\$97,417.88	

<sup>1</sup>No record.

APPENDIX H—*Continued*

## CRIMINAL PROSECUTIONS UNDER THE NATIONAL PROHIBITION ACT IN THE FEDERAL COURTS, BY INDIVIDUALS

	1927	1928	1929
Commenced during the year....	50,250	73,034	74,723
Terminated during the same period.....	51,945	77,799	75,298
Convictions.....	36,546	58,813	56,546
Acquittals.....	1,557	2,722	2,666
Nol pros or dismissed.....	13,842	17,264	16,086
Pleas of guilty.....	33,430	54,325	51,651
Trials by jury.....	4,399	7,072	4,622
Pending close of year (by cases)	20,173	18,005	19,468
Fines and penalties imposed....	\$5,775,225.48	\$7,031,109.66	\$7,363,492.22
Average fine.....	\$157.90	\$120.00	\$130.00
Number of jail sentences imposed	<sup>1</sup> 11,818	<sup>1</sup> 15,793	<sup>1</sup> 19,074
Average sentence (based on every conviction) days.....	<sup>1</sup> 44	<sup>1</sup> 34.4	<sup>1</sup> 47.3
Average sentence (based on number of jail sentences given) days	<sup>1</sup> 136.4	<sup>1</sup> 120.7	<sup>1</sup> 140.4
Per cent of jail sentences.....	132.3	128.5	133.7
Per cent of convictions.....	170.3	175.5	175.0

<sup>1</sup>Suspended, paroled, and probated sentences not included.

## APPENDIX I

### STATE REFERENDUMS ON PROHIBITION QUESTIONS SINCE 1920

(SOURCES: *Hearings of a Subcommittee of the Senate Committee on the Judiciary, 69th Congress, 1st Session; Editorial Research Reports, Washington; New York Times*)

YEAR	STATE	QUESTION	YES	NO
1920	California	Adoption of state enforcement law	400,475	465,537
1920	Massachusetts	Legalization of light wines and beer	442,215	432,951
1920	Missouri	Adoption of state enforcement law	481,880	420,581
1922	California	Adoption of state enforcement law	445,077	411,134
1922	Ohio	Referendum on 2.75 per cent beer	719,505	908,522
1922	Massachusetts	Adoption of state enforcement law	323,964	427,840
1922	Illinois	Referendum on light wines and beer	1,065,242	512,111
1924	Massachusetts	Adoption of state enforcement law	454,656	446,473
1926	California	Repeal of state enforcement law	502,258	565,875
1926	Colorado	Liberalization of state enforcement law	107,749	154,672
1926	Illinois	Appeal to Congress to modify Volstead Act	840,631	556,592
1926	Missouri	Repeal of state liquor laws	294,388	569,931
1926	New York	Appeal to Congress to modify Volstead Act	1,763,070	598,484
1926	Montana	Repeal of state enforcement law	83,231	72,982
1926	Nevada	Appeal to Congress to summon a convention to propose an amendment to the Eighteenth Amendment.		
			18,131	5,352
1926	Wisconsin	Referendum on 2.75 per cent beer	349,443	177,602
1928	North Dakota	Repeal of prohibition clause in state Constitution	96,837	103,696
1928	Montana	Re-adoption of state enforcement law	68,431	80,619
1928	Massachusetts	Instructing state Senators to vote for resolution requesting repeal of the Eighteenth Amendment		
1929	Wisconsin	Repeal of state enforcement law	707,352	422,655
			339,337	196,402

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